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Finding Terrorists' Intent: Aligning Civil Antiterrorism Law with National Security

Christopher W. Robbins

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FINDING TERRORISTS' INTENT: ALIGNING CIVIL ANTITERRORISM LAW WITH NATIONAL SECURITY

CHRISTOPHER W. ROBBINS[†]

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[†] Law Clerk to Judge Louis H. Pollak, Senior Judge, United States District Court for the Eastern District of Pennsylvania; J.D., 2009, University of Pennsylvania Law School; B.A., 2006, Tufts University. I am grateful to Professor Gideon Parchomovsky for his guidance throughout the process of writing this Article. I would also like to thank Professor Catherine Struve for her helpful comments on an earlier draft. I am indebted to Professor Stephen Burbank and Chief Judge Anthony Scirica for introducing me to the exciting area of international civil litigation. The views expressed are wholly mine, and all mistakes are invariably my own.

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INTRODUCTION

On November 26, 2008, gunmen attacked two luxury hotels, a train station, and a Jewish center in Mumbai, killing over one hundred.¹ Twenty-eight of the dead were foreigners, including six Americans.² Early reports stated incorrectly that the terrorists directed their attack at Americans.³ The legal response to incidents such as the Mumbai attacks will play an important role in the continued struggle of the American government against international terrorist groups. The current legal framework—provided through antiterrorism laws, particularly civil antiterrorism laws—fails to adequately answer the most important question arising when providing a legal response to terror: What justifies a country applying its own law to the conduct of terrorists in foreign lands?

¹ Somini Sengupta, *Terror Attacks Kill Scores in India; U.S. Hostages Reported Held at Hotels*, N.Y. TIMES, Nov. 27, 2008, at A1.

² Somini Sengupta, *A Security Chief Quits as India Struggles To Respond to Attacks*, N.Y. TIMES, Dec. 1, 2008, at A1.

³ Sengupta, *supra* note 1.

If one were to attempt to justify the application of U.S. law to the conduct of the Mumbai gunmen, which of the above facts would be most relevant: that the gunmen were engaging in terrorist acts, that they killed six Americans, or that the gunmen's intended targets were reported to be American? This Article answers that question by clarifying when a victim should be able to bring suit under U.S. law for terrorist attacks abroad. This Article proposes that the intent to harm U.S. nationals because of their nationality constitutes the most important factor when determining which terrorist attacks outside the U.S. should give rise to civil suits within the U.S.

However, international law and domestic law ignore the important element of the terrorists' intent towards the United States and its nationals. Instead, the nationality of the victims—whether they were the intended victims or not—is given undue importance in scholarly and legal analysis of the extraterritorial application of antiterrorism laws. This principle of passive personality, that a country can prohibit conduct that harms its nationals, fails to justify the application of antiterrorism laws to terrorist acts that occur outside of the country wishing to apply its laws.

This Article exposes that the extraterritorial application of antiterrorism laws cannot be justified using the current principles of international law on extraterritoriality—particularly, universal jurisdiction, passive personality, and protective jurisdiction. For example, the fact that the Mumbai attackers were “terrorists,” in the view of some, could justify the extraterritorial application of U.S. law. Under the current principles of international law providing the basis for a state to apply its own laws extraterritorially—principles of prescriptive jurisdiction—a state can apply its laws if the conduct violated a universally recognized norm. This constitutes universal jurisdiction. Thus, if one views the terrorist as the modern day pirate, one would argue that international law does or should contain a prohibition on such conduct enforceable by every country. Currently, the international community lacks the consensus needed to support this general antiterrorism norm.⁴ Without a consensus, universal prescriptive jurisdiction for terrorist acts cannot be justified.

⁴ See *infra* Part I.B.4.

The fact that American nationals were killed also arguably provides jurisdiction under the principle of passive personality—another basis of prescriptive jurisdiction in international law. The U.S. has chosen to organize much of its antiterrorism laws around the principle that the U.S. has jurisdiction to proscribe terrorist acts that harm U.S. nationals, even if they were not the intended target. Passive personality fails to encapsulate the national security interest of a state in applying its antiterrorism laws because it will apply even when neither that country nor its nationals were the target of the attack. Passive personality remains controversial and many states, including the U.S., object to its use in every other substantive area.⁵

Lastly, because terrorists target Americans, the U.S. should be able to apply its own laws. However, the principle of protective jurisdiction only allows a country to apply its laws when the state, itself, is targeted. Protective jurisdiction, in the view of the U.S. and many other countries, does not apply when only civilians are targeted.

Domestic antiterrorism law and international law on extraterritoriality have paid almost no attention to what seems like the most important factor in determining whether the U.S. should be involved through the application of its laws: Did the terrorist target Americans because of their nationality?

This Article proposes using terrorists' intent as a means of further buttressing the U.S. national security apparatus with effective civil antiterrorism suits. Intent has an important role in allowing victims to sue in U.S. courts because intent constitutes the most effective way to align civil antiterrorism suits to the U.S.'s national security interest. Civil suits have the potential to make the U.S. safer by filling the gaps in the national security framework left between nonlegal efforts in the war against terror and criminal prosecutions. The national security and intelligence apparatus have been imperfect in discovering new threats. Criminal prosecutions are limited by a higher standard of proof and the need to extradite the accused to the United States. In contrast, civil plaintiffs and their attorneys will investigate and file suit over terrorist attacks that the U.S. government may have failed to scrutinize adequately. Using intent as the limitation on whether a victim can sue will focus

⁵ See *infra* Part I.B.3.

these private attorneys general's attempts on the most relevant factor for U.S. national security purposes: the intent of the terrorist group toward the U.S. and its nationals.

This Article argues that due to the failure to develop an alternative jurisdictional basis for unconventional security threats, U.S. antiterrorism law and international law on prescriptive jurisdiction are insufficient to address the threat that international terrorism poses and must be reformed. The aim of the proposed reform is to develop a new jurisdictional basis that reflects when national security requires states to act in the age of global trade and global terror.

My proposed concrete reform is predicated on principles of security, legality, and practicality, and it is designed to achieve the right balance between them. First, the principle of security requires that the U.S. antiterrorism laws should only apply to situations where U.S. national security interests are implicated and not to cases where a U.S. national may have been an innocent bystander in a conflict unrelated to U.S. interests—as allowed in the current regime. Second, the principle of legality necessitates that the prescriptive jurisdictional basis used must serve to guide future attempts to use legal methods against national security threats within the confines of international law. Lastly, the new system must provide a clear way for judges to evaluate the interests of the U.S. when deciding whether or not to apply U.S. law to terrorist activity that occurred abroad, satisfying the last principle—practicality. Currently, judges often resist allowing lawsuits that implicate national security and foreign policy concerns due to the difficulty in deciding what interests are implicated.

In order to best balance these concerns of security, legality, and practicality, U.S. antiterrorism law should contain an intent element. This intent element will form a new basis of prescriptive jurisdiction. A country will be able to apply its laws extraterritorially to persons who intend to physically harm its nationals because of their nationality.

An intent-based jurisdiction will make the U.S. safer, satisfying the first principle—security. Under the current regime, plaintiffs need only show injury to a U.S. national during an act of terrorism. There is no requirement that the attack be directed at the U.S. or its nationals. Under my proposed regime, the intent of the terrorists becomes the primary focus. Thus,

plaintiffs will spend time and money investigating terrorists' intent regarding the U.S. and its nationals. Incipient anti-American terrorist organizations, which may not currently receive attention from the national security apparatus because of their relative anonymity or lack of a large operational capacity, will be examined by potential plaintiffs for their intent regarding the U.S. and its nationals in carrying out an attack. Victims of terrorist attacks will have this incentive to investigate the anti-American nature of a group because it allows them to sue in U.S. courts under U.S. laws.

On the other hand, attacks that are not directed at Americans will no longer result in U.S. courts and U.S. law assigning fault in local or regional conflicts. Because the current framework only requires that a U.S. national be injured, attacks carried out as part of domestic or regional conflict may be the subject of dispute in U.S. courts if an American ends up as an unintentional victim of the attack. Lawsuits over these types of attacks implicate the U.S. in foreign policy quagmires, leading to a greater chance of hurting rather than advancing U.S. foreign policy or national security interests. The proposed reform will reduce the instances where U.S. courts must adjudicate attacks arising from conflicts where U.S. national security interests are not directly implicated, satisfying the concerns of security.

An intent-based national security jurisdiction will also provide a framework for development of international law regarding the extraterritorial application of law to unconventional security threats. The current U.S. antiterrorism regime uses passive personality jurisdiction—the idea that a country can proscribe conduct that injures its nationals. Using the nationality of the victim as the limiting factor results in the application of U.S. law to many situations where the U.S. national was an unforeseen victim, and the national security interests of the U.S. are not implicated. Unfortunately, the other types of prescriptive jurisdiction recognized under international law cannot properly apply to general antiterrorism legislation. Universal jurisdiction remains unavailable. With the exception of limited types of terrorist acts that are prohibited under widely ratified international treaties, international law does not recognize a prohibition on terrorist acts sufficient to justify the use of universal jurisdiction. Another possible basis, protective jurisdiction, also does not apply. Protective jurisdiction only

allows extraterritorial application of a country's law when an attack is meant to disrupt an important government function. Terrorist acts against civilians will often not qualify. A new intent-based jurisdiction will draw from the justification for these current jurisdictional bases of international law. It will do so in a manner that tailors the security interest of a state to situations where its laws are applied, thus responding to concerns of legality.

Lastly, an intent-based jurisdictional basis will be easier to apply than passive personality, when one considers that other freestanding procedural doctrines are now used to limit the scope of substantive antiterrorism law. The current antiterrorism laws appear to apply broadly. However, plaintiffs often fail to recover because they are unable to obtain personal jurisdiction or have their cases dismissed based on *forum non conveniens* or sovereign immunity grounds. By requiring the element of intent to harm U.S. nationals, the procedural doctrines that are meant to filter out cases without a strong relationship to the U.S. can be integrated into the substantive law. Thus, judges will look more favorably on such claims because they can be assured that the U.S. has a strong interest in adjudicating civil antiterrorism claims. In limiting the substantive law, Congress can clarify for courts that in cases where terrorists target U.S. nationals, U.S. courts should apply U.S. law and judges should be hesitant to dismiss the case. The proposed reform will be more practical than the current system or any alternatives.

This Article develops the proposal in three parts. Part I of this Article analyzes the current prescriptive jurisdictional bases of passive personality, universal jurisdiction, protective jurisdiction, and the other traditional bases of prescriptive jurisdiction—nationality and territoriality. Part II of this Article surveys the current framework for suing perpetrators of acts of international terrorism. It argues that apparently broad substantive law is unduly narrowed by procedural doctrines unrelated to concerns about terrorism. Part III argues that “intent-based national security jurisdiction” will allow civil suits in U.S. courts to expose terrorist acts and terrorist groups that threaten U.S. national security in a manner that will make the U.S. more secure, make application of U.S. law more acceptable to other countries, and make judges more willing to entertain causes of action involving terrorist acts abroad.

I. SPLITTING THE DIFFERENCE: USING AN ILL-FITTING PASSIVE PERSONALITY JURISDICTION TO AVOID THE LIMITS OF UNIVERSAL JURISDICTION AND PROTECTIVE JURISDICTION

Currently, successfully bringing and adjudicating claims based on international terrorist attacks abroad remains onerous due to the need determine which cases properly belong in U.S. courts. The problems arise from the failure of Congress to sufficiently match the scope of causes of action against international terrorists to incidents of terrorism over which it would be reasonable for the United States to claim prescriptive jurisdiction. The mismatch occurs because the principles of prescriptive jurisdiction that currently exist fail to provide a reasonable balance between the United States's security and other nations' sovereignty.

Limits on prescriptive jurisdiction, also known as legislative jurisdiction, play a role in both domestic and international law. The chimerical nature of the term "jurisdiction" has often led courts to fail to differentiate prescriptive or legislative jurisdiction from the other types of jurisdiction—that of adjudicative and enforcement jurisdiction.⁶ Prescriptive jurisdiction determines whether or not the authority purporting to provide the rule of decision has the power to legislate over the conduct at issue. In effect, it answers the question of whether a law applies extraterritorially.

American law should address issues of prescriptive jurisdiction as whether a valid claim is stated under U.S. law. The extraterritoriality of a law goes to Congress's ability to proscribe conduct and not to the court's competency to hear a case. However, particularly in the antiterrorism area, courts have mistakenly analyzed these issues under subject matter jurisdiction.⁷ The difference lies in that a claim U.S. law applies need only be nonfrivolous for a court to have subject matter jurisdiction, even though that claim may fail to state a valid cause of action because the U.S. lacks the prescriptive

⁶ CHRISTOPHER L. BLAKESLEY, *TERROR AND ANTI-TERRORISM: A NORMATIVE AND PRACTICAL ASSESSMENT* 81 (2006).

⁷ *See, e.g., Dubai Islamic Bank v. Citibank, N.A.*, 256 F. Supp. 2d 158, 163 (S.D.N.Y. 2003) (declaring that the court lacked "jurisdiction" to hear a RICO claim because the statute did not apply to the conduct at issue under principles of prescriptive jurisdiction).

jurisdiction to apply its law. The confusion may be because the antiterrorism exception to the Foreign Sovereign Immunities Act, which determines both immunity and subject matter jurisdiction, happens to use the concept of passive personality—a staple of the prescriptive jurisdiction area. This leads courts to evaluate issues of prescriptive jurisdiction incorrectly under principles of subject matter jurisdiction.⁸ A more cynical explanation is that courts construe it as subject matter jurisdiction in order to take advantage of the greater leeway in making factual findings in dismissing for lack of subject matter jurisdiction rather than attempting to address such issues in the limited review for failure to state a claim.

The five traditional bases for prescriptive jurisdiction range from limiting prescriptive jurisdiction to the sovereign territory of the state⁹ to universal jurisdiction for certain strong international norms. The prescriptive reach of U.S. antiterrorism statutes may turn out to be much more important than the development of other procedural doctrines as the evolving limits of extraterritorial application of laws “has been co-extensive with social change.”¹⁰ Other states may be highly attuned to the extraterritorial reach of a country’s laws, which are regulated by international law. Like most customary international norms, the legality of extraterritorial application of a country’s laws develops through consensus and is subject to developing norms. How the United States defines the reach of its antiterrorism laws will be a major factor in how terrorism and other unconventional national security threats are addressed under international law.

Unfortunately, the framework for justifying the exercise of prescriptive jurisdiction remains underdeveloped in domestic and international law. Courts and scholars have, for the last several decades, been limited to viewing the exercise of jurisdiction within five categories: (1) territorial jurisdiction;

⁸ For a discussion of the importance of correctly labeling a requirement as part of subject matter jurisdiction, see Christopher W. Robbins, Comment, *Jurisdiction and the Federal Rules: Why the Time Has Come To Reform Finality by Inequitable Deadlines*, 157 U. PA. L. REV. 279, 287 (2008). For example, a court must recognize a requirement of subject matter jurisdiction *sua sponte* and can make its own factual findings. *Id.* at 288.

⁹ BLAKESLEY, *supra* note 6, at 63 (noting that the territorial view governed from the Treaty of Westphalia in 1648 until the early Twentieth Century).

¹⁰ *Id.* at 62.

(2) active personality, also known as nationality jurisdiction; (3) protective jurisdiction; (4) passive personality; and (5) universal jurisdiction.¹¹ These categories arise from the attempt, in 1935, by the American Society of International Law to codify the principles of international law with regard to the limits of prescriptive jurisdiction in criminal law.¹² This list has become the primary reference point for determining extraterritorial application of laws under international law,¹³ even outside the U.S.¹⁴ Called the Draft Convention on Jurisdiction with Respect to Crime ("Draft Convention"), the epic effort of the American Society of International Law was meant to supplement the paucity of leading cases and international treaties on prescriptive jurisdiction. The American Society of International Law reviewed the national law codes of several dozen countries in order to develop the categories.¹⁵

The current statutes, cases, and academic literature struggle to fit civil litigation against terrorism into the categories of universal jurisdiction, passive personality jurisdiction, or protective jurisdiction. Indeed, to be successful at justifying the U.S.'s proscription on terrorist acts abroad, one must either distort the true scope of the U.S. antiterrorism statutes or obfuscate the limits of the traditional jurisdictional categories. None of the five current jurisdictional bases sufficiently supports the current scope of civil antiterrorism legislation. Universality fails because there is no international agreement on the meaning

¹¹ See Jordan J. Paust, *Federal Jurisdiction over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under the FSIA and the Act of State Doctrine*, 23 VA. J. INT'L L. 191, 199–201 & nn.32, 39 (1983) (describing cases from the 1960s using the five categories). Although commonly referred to as recognizing passive personality along with its listing of the five categories, the work of the American Society of International Law, developing the categories, actually disclaimed passive personality's use. See *infra* Part I.B.3.

¹² The Am. Soc'y of Int'l L., *Draft Convention on Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435, 445 (Supp. 1935) [hereinafter *Draft Convention*] (naming five categories).

¹³ See Frank Tuerkheimer, *Globalization of U.S. Law Enforcement: Does the Constitution Come Along?*, 39 HOUS. L. REV. 307, 314 (2002) ("Perhaps the most definitive statement of jurisdiction over transnational crime was articulated in 1935 in the *Draft Convention on Jurisdiction with Respect to Crime* by Harvard Research in International Law.").

¹⁴ See Robert J. Currie & Stephen Coughlan, *Extraterritorial Criminal Jurisdiction: Bigger Picture or Smaller Frame?*, 11 CAN. CRIM. L. REV. 141, 145–48 (2007) (citing the five bases for extraterritorial application of Canadian criminal law).

¹⁵ *Draft Convention*, *supra* note 12, at 444–45.

of terrorism, and the current consensus on what is a prohibited act under international law constitutes only a sliver of the conduct covered by U.S. antiterrorism laws. Protective jurisdiction similarly fails because the terrorist attack must be directed against an important official government function, not simply the nationals of the state. Passive personality, assuming the international community did accept the principle, could provide such a basis, but in all other substantive areas, the U.S. objects to its use.

A. *Domestic Legal Tests for Extraterritorial Application of U.S. Law: Incorporation of International Law*

Under domestic U.S. law, limits on prescriptive jurisdiction take the form of the "dual presumptions" of legislative interpretation that, unless a contrary intent is expressly stated or clearly implied, (1) a statute does not apply extraterritorially,¹⁶ and (2) courts will not interpret statutes to violate the international law of prescriptive jurisdiction.¹⁷ The judiciary developed these presumptions to minimize unintended clashes between U.S. laws and foreign law and to avoid inadvertent violation of international law.¹⁸

In domestic law, the concept of territoriality largely coincided with American courts' views of international law limits until the early twentieth century. Nineteenth century decisions touted the principle that a state has power over all that occurs within its borders but none over that which occurs outside of them. For example, ideas of territorial-based jurisdiction were incorporated in personal jurisdiction limitations developed by the Supreme Court in the late nineteenth century.¹⁹

¹⁶ See *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 355-56 (1909) ("[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where it is done."). The extraterritorial presumption has less strength in the criminal context. See *United States v. Bowman*, 260 U.S. 94, 98 (1922).

¹⁷ *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

¹⁸ BLAKESLEY, *supra* note 6, at 67 (citing *Smith v. United States*, 507 U.S. 197 (1993)).

¹⁹ See *Pennoyer v. Neff*, 95 U.S. 714, 720, 729-30 (1877) (citing principles of international law in determining that a state attempting to bind a citizen in another state through a civil judgment could not because "neither the legislative jurisdiction nor that of courts of justice had binding force.") (internal quotation marks omitted), *overruled by Shaffer v. Heitner*, 433 U.S. 186, 212 (1977).

Finding that the territorial view of prescriptive jurisdiction would rob criminal prohibitions of their effectiveness in an age of increased international travel and communication, the Supreme Court began, in the early twentieth century, to frequently interpret statutes as having extraterritorial application, yet being limited by international law in the area.²⁰ Even if a statute applies extraterritorially, courts impose a second presumption, called the *Charming Betsy* presumption,²¹ that Congress must also clearly intend the statute to violate international law regarding prescriptive jurisdiction. Thus, statutes that by clear implication or express legislative history apply extraterritorially must still fit within one of the five traditional jurisdictional bases of international law. However, if international law does not recognize a particular prescriptive jurisdictional basis, Congress can still write laws that apply extraterritorially provided they state their intent clearly enough to negate the *Charming Betsy* presumption.²²

B. International Limits on Extraterritorial Application of U.S. Law: A Failure To Address Unconventional Security Threats

According to the 1935 Draft Convention, which continues to hold sway with courts and scholars,²³ international law recognizes five categories of prescriptive jurisdiction with varying degrees of international consensus supporting their legality. Besides territorial jurisdiction, concepts of nationality, passive personality, universality, and protective jurisdiction can arguably provide jurisdiction.²⁴ The last three categories, which in theory

²⁰ See *Bowman*, 260 U.S. at 98 (1922) (explaining that if the statute in question is not “logically dependent on [its] locality for the government’s jurisdiction,” but is enacted for the government’s right to defend itself, then it is reasonable to assume that Congress intended for the statute to apply extraterritorially); BLAKESLEY, *supra* note 6, at 65–67.

²¹ Named for the case where it was first applied. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

²² See *Edye v. Robertson*, 112 U.S. 580, 598–99 (1884) (noting that Congress can pass valid statutes that violate international law).

²³ See, e.g., Tuerkheimer, *supra* note 13, at 314; Currie & Coughlan, *supra* note 14, at 145–48.

²⁴ Cf. *Bills To Authorize Prosecution of Terrorists and Others Who Attack U.S. Government Employees and Citizens Abroad: Hearings on S. 1373, S. 1429 and S. 1508 Before the S. Subcomm. on Security and Terrorism of the S. Comm. on the Judiciary*, 99th Cong. 25 (1985) (statement of Raymond J. Celada, Senior Specialist in American Public Law, Congressional Research Service) [hereinafter *Prosecution*

have the most potential for use with U.S. antiterrorism statutes, do not adequately account for the reasons to apply a country's law to unconventional national security threats.

1. Territorial Jurisdiction

International law recognizes territoriality as a justification for prescriptive jurisdiction so long as some conduct occurred in the state or the conduct was intended to and did have a substantial effect within the country. These two different methods of defining territoriality differentiate the two theories of territorial jurisdiction: subjective and objective. Subjective territorial jurisdiction exists when parts of the conduct have occurred in the state wishing to apply its own laws, even if some of the conduct may have occurred elsewhere.²⁵ The domestic "conduct test" reflects the subjective theory of territorial jurisdiction.²⁶ Objective territorial jurisdiction exists when the effects of the conduct happen in the state that wishes to apply its own law but the conduct or elements of the conduct occur outside the jurisdiction.²⁷ Domestic law adopts the objective theory of territorial jurisdiction most prominently in the "effects test," which determines the extraterritorial application of U.S. antitrust laws.²⁸ Territorial jurisdiction can provide a basis to legislate regarding conduct when some or all of the conduct has been completed abroad so long as there was some conduct or an effect within the U.S.

Territorial jurisdiction's universal recognition²⁹ makes it a strong basis for attempting to justify the application of a state's laws. However, particularly in the antiterrorism area, the usefulness of its universal acceptance is offset by its narrow scope. Because either conduct or an actual effect must occur within the country, territorial jurisdiction does not provide a

Authorization Hearings] (noting that international law recognizes five bases of extraterritorial application of criminal law).

²⁵ Christopher L. Blakesley & Dan E. Stigall, *The Myopia of U.S. v. Martinelli: Extraterritorial Jurisdiction in the 21st Century*, 39 GEO. WASH. INT'L L. REV. 1, 14–15 (2007).

²⁶ BLAKESLEY, *supra* note 6, at 100.

²⁷ Blakesley & Stigall, *supra* note 25, at 14–15.

²⁸ BLAKESLEY, *supra* note 6, at 100.

²⁹ *Draft Convention*, *supra* note 12, at 484 ("The territorial principle has not only been universally accepted by the States, but it has had a significant development in modern times.").

basis for jurisdiction until an attack has already happened or terrorists have performed acts within the U.S. This is obviously unacceptable, as the purpose of using criminal and civil antiterrorism laws is to prevent and deter terrorist acts in the U.S. by detecting terrorist groups before they conduct an attack on U.S. soil.

2. Nationality

Exercising prescriptive jurisdiction based on the conduct of a country's *own* nationals represents another of the longest recognized bases for extraterritorial jurisdiction under both domestic³⁰ and international law.³¹ However, it also represents one of the least useful for attempting to regulate transnational conduct like terrorism. With a few notable exceptions,³² members of *international* terrorist enterprises that threaten the security of the United States and its nationals were not born in the United States, nor did they swear an oath of citizenship. Thus, nationality provides an even more limited basis than territoriality to exercise jurisdiction.

3. Passive Personality

Passive personality arguably represents a valid basis of extraterritorial jurisdiction in both domestic and international law for the criminal prosecution of terrorists.³³ Passive personality allows the state to regulate conduct that harms one of its nationals.³⁴ Thus, under the principle of passive personality, the U.S. can regulate any conduct committed abroad by persons who are not U.S. nationals so long as a U.S. national is harmed. Although a few states have passed general

³⁰ *Blackmer v. United States*, 284 U.S. 421, 436 (1932); *Jones v. United States*, 137 U.S. 202, 212 (1890).

³¹ *Draft Convention*, *supra* note 12, at 519–20.

³² For example, one of the members of Al-Qaeda who organized the 1998 bombings of the U.S. embassies in Kenya and Tanzania, Wadhi El-Hage, was a naturalized U.S. citizen. *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 93, 104 (2d Cir. 2008). The most famous case is John Walker Lindh, the so-called American Taliban, a naturally born U.S. citizen who went to Afghanistan to join the Taliban. See *United States v. Lindh*, 228 F. Supp. 2d 565, 567–68 (E.D. Va. 2002).

³³ BLAKESLEY, *supra* note 6, at 124–25 (noting that passive personality is “gaining international recognition” but justifying current law through the protective principle).

³⁴ Blakesley & Stigall, *supra* note 25, at 13.

extraterritorial criminal laws based on passive personality,³⁵ most of the activity in the area of passive personality has generally concerned terrorism.³⁶

The 1935 Draft Convention of the American Society of International Law introduced passive personality as a limitation on universal jurisdiction and not as an independent jurisdictional basis.³⁷ Although the Draft Convention is often referred to as acknowledging the principle of passive personality jurisdiction,³⁸ the Draft Convention only recognized its use when universal jurisdiction would already justify the extraterritorial application of law.³⁹ Thus, passive personality only served to express a preference that the state whose nationals were injured should assert prescriptive jurisdiction when a universally prohibited offense was committed outside the territory of any state.⁴⁰ The drafters thought that the victim's country would be the most likely to attempt to punish an offense even though any country could, in theory, apply its laws to punish the offender under universal jurisdiction.⁴¹

³⁵ For example, France has purported to enact a criminal code protecting its citizens abroad but has done little to attempt to enforce it. See Eric Cafritz & Omer Tene, *Article 113-7 of the French Penal Code: The Passive Personality Principle*, 41 *COLUM. J. TRANSNAT'L L.* 585 (2003) (analyzing a provision of French law providing that "French criminal law is applicable to any felony, as well as to any misdemeanor punishable by imprisonment, committed by a French or foreign national outside the territory of the French Republic, where the victim is a French national at the time of the offense." (citing Code pénal [C. pén.] art. L.113-7 (Fr.))). Australia has a law punishing those who murder Australian citizens or residents. See James Cockayne, *On the Cosmopolitization of Criminal Jurisdiction*, 3 *J. INT'L CRIM. JUST.* 514, 519 (2005) (citing Offenses against Australians Act of 2002).

³⁶ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 cmt. g (1987).

³⁷ *Draft Convention*, *supra* note 12, at 578.

³⁸ See Blakesley & Stigall, *supra* note 25, at 13; Ellen S. Podgor, *A New Dimension to the Prosecution of White Collar Crime: Enforcing Extraterritorial Social Harms*, 37 *MCGEORGE L. REV.* 83, 97 & n.113 (2006).

³⁹ *Draft Convention*, *supra* note 12, at 579 ("[S]ince universality thus circumscribed serves every legitimate purpose for which passive personality might be invoked in such circumstances, it seems clear that recognition of the latter principle in the present Convention would only invite controversy without serving any useful objective.").

⁴⁰ *Id.* at 589 (noting that "[t]he present Convention excludes the theory of passive personality" but in the absence of any state that would have territorial authority and under principles of universal jurisdiction, it would be prudent to assign the country whose national was injured the ability to apply its laws).

⁴¹ *Id.* at 589-90.

The Draft Convention did not give the passive personality a ringing endorsement by noting that both countries and scholars differed on whether it should be a valid basis.⁴² Their mention of the principle contained numerous caveats that it “has been more strongly contested than any other type of competence,” “has been vigorously opposed in Anglo-American countries,” “has had distinguished opponents among Continental writers,” and “it is the most difficult to justify in theory.”⁴³ Hence, they did not use it as an independent jurisdictional basis.

Passive personality continues to have the weakest foundation in international law of the bases listed.⁴⁴ The United States itself continues adamantly to refuse to recognize the passive personality principle outside of regulation of international terrorist acts.⁴⁵ Despite a debatable increase in its use in terrorism and human rights statutes,⁴⁶ and a begrudging acceptance in the Restatement (Third) of Foreign Relations Law,⁴⁷ the international community has not recognized passive personality to the degree needed to justify current antiterrorism

⁴² *Id.* at 578 (“An important group of states asserts such jurisdiction; others would contest it. Many writers favor it, while others oppose it.”).

⁴³ *Id.* at 579.

⁴⁴ See Geoffrey R. Watson, *The Passive Personality Principle*, 28 TEX. INT'L L.J. 1, 13–14 (1993) (“It seems doubtful that [the] limited amount of state practice amounts to a rule of customary international law endorsing passive personality jurisdiction. On the other hand, it seems equally doubtful that state practice has generated a rule of customary international law *barring* passive personality jurisdiction”) (emphasis in original); Blakesley & Stigall, *supra* note 25, at 26 (“As a basis of jurisdiction, the passive personality principle is not widely accepted.”). Other than the ATA and FSIA exceptions, it would appear to be even rarer to use passive personality for civil prescriptive jurisdiction.

⁴⁵ See Watson, *supra* note 44, at 2–3 (“Many countries, including the United States have traditionally opposed this theory of jurisdiction.”); see also Joshua Robinson, *United States Practice Penalizing International Terrorists Needlessly Undercuts Its Opposition to the Passive Personality Principle*, 16 B.U. INT'L L.J. 487, 489–91 (1998) (summarizing history of U.S. opposition to passive personality jurisdiction); see generally Watson, *supra* note 44, 4–15 & n.6 (citing legislative statements, diplomatic protests, and a judicial opinion disapproving of other states attempts to use passive personality, all of which range from 1887 to 1991).

⁴⁶ Eric Talbot Jensen, *Exercising Passive Personality Jurisdiction over Combatants: A Theory in Need of a Political Solution*, 42 INT'L LAW. 1107, 1118–19 (2008) (noting that European countries appear to give the principle greater acceptance). However, Colonel Jensen's examples of statutes and treaties regarding genocide and torture are likely supported by universal jurisdiction, with passive personality acting as either further jurisdictional support or as a prudential but not legal limit on the implementation of universal principles.

⁴⁷ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (1987).

laws. For example, the Restatement limits its use to times when a U.S. national was harmed in terrorist attack because of his or her nationality.⁴⁸ The comments to the Restatement question whether its use is broadly supported by noting that “[t]he [passive personality] principle has not been generally accepted for ordinary torts or crimes, but it is increasingly accepted as applied to terrorist and other organized attacks on a state’s nationals *by reason of their nationality*, or to assassination of a state’s diplomatic representatives or other officials.”⁴⁹ Even this limited statement represents an expansion of the view held by the authors of the Restatement (Second) that passive personality was not a legitimate basis of jurisdiction.⁵⁰ In practice, the U.S. has never limited its use of passive personality for antiterrorism statutes to the limited basis recognized in the Restatement over attacks on a U.S. national “by reason of” U.S. nationality.

Currently, passive personality represents the dominant theory of extraterritorial jurisdiction relied upon by Congress in passing the Antiterrorism Act (“ATA”), the primary civil cause of action for terrorist activity, and the terrorism exception abrogating foreign countries’ sovereign immunity in U.S. courts.⁵¹ Congress first incorporated passive personality into domestic criminal antiterrorism laws as an amendment to the Omnibus Diplomatic Security and Antiterrorism Act of 1986,⁵² where it

⁴⁸ *Id.*

⁴⁹ *Id.* § 402 cmt. g (emphasis added). Even this comment may overstate the acceptance of the principle, as a key piece of support for the proposition was the passage of criminal regulation by the U.S. Congress against terrorist acts committed against U.S. nationals. *See id.* § 402 reporter’s note 3 (citing Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399). Congress may have relied upon the draft version of the Restatement (Third), which stated that some countries used passive personality jurisdiction over terrorism acts without citation to pass the Antiterrorism Act of 1986. *Prosecution Authorization Hearings, supra* note 24, at 28 (1985) (statement of Raymond J. Celada, Senior Specialist in American Public Law, Congressional Research Service (citing Restatement, Foreign Relations Tentative Draft No. 6 § 402 cmt. g (1985))).

⁵⁰ *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 30(2) (1965) (“A state does not have jurisdiction to prescribe a rule of law attaching legal consequences to conduct of an alien outside its territory merely on the ground that the conduct affects one of its nationals.”).

⁵¹ *See infra* Part II.B.2.

⁵² Omnibus Diplomatic Security and Antiterrorism Act § 1202; *United States v. Yunis*, 681 F. Supp. 896, 902–03 (D.D.C. 1988), *aff’d*, 924 F.2d 1086 (D.C. Cir. 1991) (justifying the Act on passive personality and universal jurisdiction grounds but rejecting that protective jurisdiction would allow for extraterritorial application of the law). *But see* BLAKESLEY, *supra* note 6, at 124–25, 139 (arguing that the

extended the criminal prohibition on extraterritorial killing of certain high-ranking U.S. officials to all U.S. citizens killed by acts of international terrorism abroad.⁵³ Despite some arguments that such statutes relied on “protective jurisdiction” and not passive personality,⁵⁴ the Conference Report made clear that prosecutors need not prove that the attackers intended to kill a U.S. national, only that a U.S. national was murdered.⁵⁵ This mirrored the most pervasive understanding of passive personality, that the injury to a national justifies prescriptive jurisdiction.

U.S. antiterrorism laws have few limits on the principle other than that it only applies in instances of a terrorist attack. Congress did limit the provision to avoid prosecution of “[s]imple barroom brawls or normal street crime” by requiring the Attorney General to certify that the act was intended to “coerce, intimidate, or retaliate against a government or civilian population” in order for criminal prosecution to proceed.⁵⁶ That a terrorist act may be intended to coerce other countries and not

protective principle was the jurisdictional basis because it is limited to terrorist acts, which appear to be intended to coerce civilian populations or government policy). It remains questionable if an attack on a U.S. national represents the threat to the *important governmental function* required for application of protective jurisdiction. *See id.* at 115 n.224 (collecting cases that recognize the existence of the protective principle but limit its application to acts “directly injurious to the government” such as counterfeiting).

⁵³ *See* H.R. REP. NO. 99-783, at 87 (1986) (Conf. Rep.) (adopting Senate proposal to extend criminal prohibitions to murders of U.S. citizens abroad during terrorists acts). Senator Specter, in introducing the bill, called the jurisdictional principle the “protective principle.” 132 Cong. Rec. 2356 (1986) (remarks of Sen. Specter). However, the basis is properly passive personality, despite Congress having a habit of invoking protective jurisdiction. *See* Watson, *supra* note 44, at 31 (“[Congress] has adopted several anti-terrorism statutes founded at least partly on passive personality jurisdiction, though it prefers to call this legislation an exercise of protective jurisdiction.”).

⁵⁴ *Prosecution Authorization Hearings*, *supra* note 24, at 22–23 (statement of Raymond J. Celada, Senior Specialist in American Public Law, Congressional Research Service) (noting that both protective jurisdiction and passive personality would support exercising criminal jurisdiction over attacks that injure American officials abroad); Watson, *supra* note 44, at 9 (noting that statutes penalizing crimes against American officials and diplomats abroad “can be understood as examples of the protective principle of jurisdiction rather than the passive personality principle”).

⁵⁵ *See* H.R. REP. NO. 99-783, at 87 (“As in the Senate amendment, there is no requirement that the U.S. Government prove during the criminal prosecution the purpose of the murder.”).

⁵⁶ *See id.*

the American government or American civilian population is irrelevant. Congress later used the criminal provisions as a basis for civil liability in the ATA, while retaining passive personality as the theory for the extraterritorial application of U.S. laws.⁵⁷ In contrast to the in-depth examination of the principles of extraterritorial application of law when it passed the criminal antiterrorism provisions in 1986,⁵⁸ Congress assumed with little discussion that the same jurisdictional bases would serve its purpose in passing the civil ATA.⁵⁹

The current system of allowing civil suits for terrorist acts abroad arguably pushes beyond the extent that passive personality allows extraterritorial application of U.S. laws.⁶⁰ Many members of Congress considered the regulation of attacks injuring American nationals to be permissible under international law.⁶¹ However, the Restatement requires that the attack be directed at U.S. nationals, while Congress specifically disclaimed any such limitation.⁶² The U.S.'s recognition of the

⁵⁷ See H.R. REP. NO. 102-1040, at 5 (1992) ("The Congress in 1986 passed criminal legislation, the so-called 'long-arm' statute, which provides extraterritorial criminal jurisdiction for acts of international terrorism against U.S. nationals. The Committee believes that there is a need for a companion civil legal cause of action for American victims of terrorism.") (internal citation omitted).

⁵⁸ *Prosecution Authorization Hearings*, *supra* note 24, at 31 (statement of Sen. McConnell) ("I have concern that the bill, S. 1373, seeks to exert extraterritorial jurisdiction in a novel and perhaps unconstitutional manner."); *id.* at 33 (statement of Sen. Specter) (declaring version of bill "will in no way contravene or conflict with either international or constitutional law."); *id.* at 36 (statement of Sen. Specter) (noting that "international law . . . recognizes broad *criminal* jurisdiction" (emphasis added)); *id.* at 68 (statement of Hon. Abraham D. Sofaer, Legal Adviser, U.S. Department of State) (supporting the bill but noting that "[e]ven though some States may extend their criminal jurisdiction generally to serious crimes against their nationals abroad, any such extension should be implemented cautiously").

⁵⁹ See *Antiterrorism Act of 1990: Hearing on S. 2465 Before the S. Subcomm. on Courts and Administrative Practice of the S. Comm. of the Judiciary*, 101st Cong. (1990) [hereinafter *1990 ATA Hearing*] (containing no discussion of alternative bases for extraterritorial reach of the ATA).

⁶⁰ The legal analysis requested by Congress with respect to proposed criminal regulation in 1986 discussed two competing provisions: one covering only injury to U.S. officials and the other applying to injuries to U.S. nationals. The legal analysis found the first provision supported by protective and passive personality jurisdiction but found that the second provision encompassing all U.S. nationals "seems to implicate the universality principle of jurisdiction." *Prosecution Authorization Hearings*, *supra* note 24, at 23 (1985) (statement of Raymond J. Celada, Senior Specialist in American Public Law, Congressional Research Service).

⁶¹ See *supra*, note 58 (Sen. Specter's remarks).

⁶² See *supra*, note 55.

principle for only antiterrorism legislation further undercuts the proposition that passive personality provides an appropriate jurisdictional basis.

4. Universal Jurisdiction

Much of the recent scholarship has focused on the universality of prohibitions on terror.⁶³ Universal jurisdiction allows prosecution of acts that constitute *jus cogens* violations of international law.⁶⁴ *Jus cogens* norms are preemptory norms so fundamental to international law that no country can refuse to enforce or obey them.⁶⁵ Universal jurisdiction encourages enforcement of these prohibitions because any state attempting to enforce the prohibition can apply its own law without concern about whether the site of the incident had a similar law. Recognizing a basis for all states to apply their own laws prevents a single country's or a small group of states' failure to prohibit the conduct from thwarting the prosecution of certain crimes.

Universal jurisdiction, although highly controversial in the early 20th Century,⁶⁶ has begun to gain acceptance. However, despite the hopes of some, the claim that there is "universal jurisdiction" for civil litigation against terrorists remains questionable.⁶⁷ Indeed, all of the terrorism-specific causes of action under U.S. law rely on less than universal jurisdiction. Instead, the terrorism-specific statutes use either passive personality or territorial jurisdiction.⁶⁸

⁶³ See Kenneth C. Randall, *Special U.S. Civil Jurisdiction*, in LEGAL RESPONSES TO INTERNATIONAL TERRORISM: U.S. PROCEDURAL ASPECTS 89, 103–104 (M. Cherif Bassiouni ed. 1988); BLAKESLEY, *supra* note 6, at 132–33 (stating sources "when considered as a whole, make it clear that terrorism—including hostage taking, kidnapping, intentional or wanton violence against innocent civilians—is often really a composite term that includes, or could be, any one of several separate universally condemned offenses"); John F. Murphy, *Civil Lawsuits as a Legal Response to International Terrorism*, in CIVIL LITIGATION AGAINST TERRORISM, 103–04 (John Norton Moore ed., 2004).

⁶⁴ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987).

⁶⁵ See BLACK'S LAW DICTIONARY 876 (8th ed. 2004).

⁶⁶ See, e.g., *Draft Convention*, *supra* note 12, at 445.

⁶⁷ See John Norton Moore, *Introduction* to CIVIL LITIGATION AGAINST TERRORISM, *supra* note 63, at 3, 5 ("[T]errorist attacks are not gray area human activities, but rather are activities that are clearly viewed as criminal in every legal system and are even criminalized in the major United Nations sponsored antiterrorism conventions embodying community consensus against such acts.").

⁶⁸ See *infra* Part II.

One could also argue that, given a stated desire to establish a universal prohibition on terrorist attacks, members of Congress believed there to be no limitation under international law because of principles of universal jurisdiction. Congress may have then limited such causes of action to attacks injuring U.S. nationals as a pragmatic, but not legal, limit on which cases the U.S. forum should hear,⁶⁹ similar to how the Draft Convention used the doctrine.

However, universal jurisdiction, if it exists for terrorist acts at all, exists only for certain acts prohibited by widely ratified international treaties. International law would not recognize universal prescriptive jurisdiction reaching terrorism as defined by domestic law under the ATA and similar statutes. The drafters of the criminal extraterritorial antiterrorism provisions were aware that customary international law did not provide universal jurisdiction over terrorist acts due to the failure to define terrorism in a manner that other countries would find acceptable.⁷⁰ The proponents seemed to be acting in the hope that U.S. antiterrorism laws would spur stalled attempts to create an international framework providing universal jurisdiction,⁷¹ while settling on using passive

⁶⁹ See K. Lee Boyd, *Universal Jurisdiction and Structural Reasonableness*, 40 TEX. INT'L L.J. 1, 42–43 (2004) (noting that several doctrines limit the role of U.S. courts in hearing cases where universal jurisdiction exists because the existence of jurisdiction does not necessarily support the prudence of exercising jurisdiction).

⁷⁰ See *Prosecution Authorization Hearings*, *supra* note 24, at 29 (statement of Raymond J. Celada, Senior Specialist in American Public Law, Congressional Research Service) (noting that universal jurisdiction over terrorist acts is difficult to establish because a uniform definition is lacking and noting that the Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, *opened for signature* Feb. 2, 1971, 27 U.S.T. 3949, 1438 U.N.T.S. 194, only had seven parties, including the United States). The difficulties of creating a general antiterrorism treaty were due to the fact that “there is little agreement regarding what constitutes terrorism and this militates against asserted ‘universality.’” *Id.* The statute has gained some acceptance since then, currently having thirteen Organization of American States (“OAS”) members as parties to the treaty. See OFFICE OF THE ASSISTANT LEGAL ADVISOR FOR TREATY AFFAIRS, U.S. DEP’T OF STATE, TREATIES IN FORCE 178 (2009).

⁷¹ 131 CONG. REC. 18871 (1985) (statement of Sen. Specter) (noting that a resolution was introduced concurrent with the criminal antiterrorism legislation, “call[ing] for international negotiations aimed at determining an international definition of terrorism which could then be established as a ‘universal crime,’ like piracy, punishable by any nation that captures the terrorists”); *Prosecution Authorization Hearings*, *supra* note 24, at 83 (prepared statement of Hon. Robert B. Oakley, Director, Office for Counterterrorism and Emergency Planning, U.S.

personality as the interim basis for legislating extraterritorially. Despite these hopes, the attempts to define and prohibit terrorism in the intervening years have not proved any more successful in forming a general prohibition.⁷²

The potential criminal violations that give rise to universal criminal jurisdiction have expanded in recent years but remain much more limited than the conduct that the United States purports to regulate.⁷³ The potential civil causes of action remain even more limited.⁷⁴ Universal jurisdiction remains unavailable to justify the broad U.S. civil antiterrorism laws.

5. Protective Jurisdiction

Protective jurisdiction effectively expands the objective territoriality theory to include conduct where a perpetrator intends the activity to have a specific effect in the country wishing to apply its law.⁷⁵ Unlike objective territoriality, the effect does not have to occur.⁷⁶ Thus, the intent to disrupt important government functions can trigger action by the

Department of State) (noting that “the legislation is a useful step in developing an international legal framework against terrorism”).

⁷² See Murphy, *supra* note 63, at 37–41 & n.5 (noting that all definitions of terrorism have failed to gain international acceptance, except a definition of international definition of terrorism as the “ad hoc” incorporation of the individual antiterror treaties).

⁷³ The Restatement lists them as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987). It disclaims a general terrorism prohibition. *Id.* cmt. a (“There has been wide condemnation of terrorism but international agreements to punish it have not, as of 1987, been widely adhered to, principally because of inability to agree on a definition of the offense.”).

⁷⁴ The principle of universality need not be limited to criminal jurisdiction, but it has gained little traction for recognizing civil causes of action. *Id.* § 404 cmt. b (“In general, jurisdiction on the basis of universal interests has been exercised in the form of criminal law, but international law does not preclude the application of non-criminal law on this basis . . .”). Recognition of a civil cause of action for torture has been aided by the Convention Against Torture. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 14, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85, 23 I.L.M. 1031 (“Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.”). The Restatement recognizes that piracy has traditionally also been allowed as an international tort. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 cmt. b.

⁷⁵ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 cmt. f (“The protective principle may be seen as a special application of the effects principle[.] . . . [I]t has been treated as an independent basis of jurisdiction.”).

⁷⁶ Blakesley & Stigall, *supra* note 25, at 22.

targeted state. For example, a conspiracy to assassinate a high official would justify exercise of prescriptive jurisdiction as soon as the perpetrators' intent is formed, well before any effects on the state attempting to exercise jurisdiction occur.

Similar to the mention of passive personality, the American Society of International Law, by recognizing protective jurisdiction in the Draft Convention, tried to synthesize different approaches. The recognition of protective jurisdiction at that time was meant "not as a restatement of existing practice, but as a means of attaining a reasonable compromise."⁷⁷ While other states may have recognized broader jurisdiction over intended attacks on their national security, the United States and Great Britain limited the principle to inference with their "public agencies and instrumentalities."⁷⁸ Domestic courts continue to interpret the protective principle to require that the conduct's effect must "threaten[] the integrity of governmental functions that are generally recognized as crimes by developed legal systems."⁷⁹ This category traditionally included counterfeiting, falsification of official documents, perjury before consular officials, and conspiracy to violate immigration or customs laws.⁸⁰ While this basis may be useful in situations such as the 1998 terrorist attacks on U.S. embassies abroad,⁸¹ it does not apply to intended attacks against strictly civilian targets. Under the U.S.'s interpretation of the protective principle, an intended terrorist attack does not give rise to jurisdiction unless the attacks were intended to disrupt governmental functions.

Despite some discussion that Congress legislated under this principle in the ATA,⁸² nowhere did members of Congress attempt to address how their "protective jurisdiction" based on the civilian victim's status as a U.S. national differed from

⁷⁷ *Draft Convention*, *supra* note 12, at 557.

⁷⁸ *Id.* at 544.

⁷⁹ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 cmt. f.

⁸⁰ *Id.* The limited category of such crimes may have been why Congress ultimately settled on wording the criminal antiterrorism provisions of the Omnibus Diplomatic Security and Antiterrorism Act of 1986 in terms of passive personality instead of the protective principle. See *Prosecution Authorization Hearings*, *supra* note 24, at 27 (statement of Raymond J. Celada, Senior Specialist in American Public Law, Congressional Research Service) (noting that "it is doubtful that [the protective principle] would sustain a law aimed at violence directed at U.S. citizens or nationals of the United State as such").

⁸¹ See *Mwani v. bin Laden*, 417 F.3d 1, 13–14 (D.C. Cir. 2005).

⁸² See *supra* text accompanying notes 53–55.

passive personality. Additionally, the legislative history failed to adequately address the concerns raised in submissions to Congress that protective jurisdiction only applied to attacks intended to disrupt important governmental functions⁸³ and has not traditionally applied to attacks merely against ordinary citizens and nationals of a country.

C. *Limitations of the Current Prescriptive Jurisdictional Bases: Why Terrorism Challenges the Five Traditional Categories*

The current jurisdictional categories inadequately address unconventional security threats like terrorism. The framework has two large problems, which this Section addresses. First, passive personality remains a very controversial and inadequate basis for jurisdiction. Passive personality has no clear limit and could offend principles of fairness inherent in an effective legal system. Second, without passive personality, the remaining jurisdictional categories do not provide a viable basis for regulating unconventional threats. No adequate intermediate step exists between universal jurisdiction and the protective principle. Unconventional threats such as terrorism do not target the important governmental functions required for protective jurisdiction, nor do they easily give rise to the consensus needed to form a *jus cogens* norm for universal jurisdiction. Thus, courts and Congress have been forced to distort the jurisdictional bases to justify antiterrorism legislation.

1. *Passive Personality: An Inadequate Principle*

Antiterrorism laws are *sui generis* in U.S. law because of the recognition of passive personality jurisdiction.⁸⁴ The United States has repeatedly objected to its use in other areas,⁸⁵ which may be why members of Congress, in a bit of imprecise terminology, referred to the antiterrorism laws of 1986 and 1990

⁸³ See *supra* note 80.

⁸⁴ See Watson, *supra* note 44, at 11 ("Outside of terrorism, however, the United States still seems reluctant to embrace passive personality jurisdiction. Although Congress has recognized passive personality jurisdiction for some terrorist offenses, it has not extended such jurisdiction to common crimes of violence against Americans on foreign soil."); see also Robinson, *supra* note 45, at 488–91 (summarizing history of U.S. opposition to passive personality jurisdiction).

⁸⁵ See Watson, *supra* note 44, at 11–12; see also Robinson, *supra* note 45, at 488–91.

as passed under "protective jurisdiction." Despite the convenience of passing the antiterrorism laws by using passive personality, the United States's prior position in opposing passive personality jurisdiction may in fact be the correct position as a matter of international law, foreign policy, and national security.

General criticisms of passive personality have been threefold: first, many critics argue that it intrudes on the sovereignty of foreign states; second, it deprives defendants of notice of what law will be applied to their conduct; and third, it is impractical, as fighting terrorism requires cooperation from states that will be unlikely to cooperate unless they also recognize passive personality as a valid basis.⁸⁶ Many other states generally prefer to enforce their laws through means other than civil litigation and large jury awards and may be resistant to broad bases of civil extraterritorial jurisdiction such as passive personality.⁸⁷

With regard to sovereignty, the argument against passive personality jurisdiction has been that it constitutes a significant intrusion into the sovereign domain of other nations without providing a corresponding benefit to the state attempting to apply its law extraterritorially.⁸⁸ Arguably, the state wishing to apply its law has an interest in protecting its nationals abroad. However, passive personality fails to protect this interest because defendants need not be aware of the victim's nationality.⁸⁹ The threat of sanctions by the state where the act is committed likely provides much greater deterrence than the threat of another state, whose laws will only apply if its nationals are (possibly unintentionally) injured.⁹⁰

The importance of cooperation to combat terrorists who oppose the United States makes the problem of offending other countries' sovereignty particularly acute. If the U.S. wishes to use criminal prosecutions and civil litigation to both punish

⁸⁶ See Watson, *supra* note 44, at 14–15 (listing criticisms).

⁸⁷ See GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 648–49 (4th ed. 2007) (noting that other countries have objected to the extraterritorial application of U.S. antitrust laws due to treble damage provisions and the fact that private plaintiffs can initiate suit).

⁸⁸ See Watson, *supra* note 44, at 16–19.

⁸⁹ See *id.* at 18–19 (stating that although passive personality jurisdiction may provide some protection to a state's nationals abroad, this protection is likely limited by the uncertain deterrent effect of such a law).

⁹⁰ See *id.*

terrorists and gather information on terrorism activities in other countries, a narrower focus can be more beneficial. Other countries may be less receptive to entries by the U.S. and its courts in extradition, aid for discovery, and enforcement of judgments if these other states are not assured that the incident being addressed directly threatens U.S. national security interests.

Relatedly, the potential terrorists of the world cannot be sure which country's law would apply unless they are aware of the nationality of their potential victims. Occasions where Americans are killed incident to a terrorist act in a foreign country's domestic conflict present the greatest concern about unfair application of U.S. law. The unfairness could potentially rise to the level of a due process violation.⁹¹ In *Phillips Petroleum Co. v. Shutts*,⁹² the Supreme Court found that applying the forum state's law to out-of-state transactions violated due process constraints unless the law applied to the case had sufficient connections to the conduct to be nonarbitrary. One may argue that an international terrorist risks injuring U.S. citizens simply by undertaking terrorist activity, and thus similar to one who injures the eggshell plaintiff, she cannot complain of the application of U.S. law.⁹³ However, if one were to change the hypothetical to an interstate car accident, it seems that allowing New York law to govern a claim against a California driver for an accident in California simply because the plaintiff is a citizen of New York would raise serious due process concerns.⁹⁴ What if it were a French driver, hit in New York, trying to sue under French law?

Thus, the argument that passive personality does not offend principles of notice seemingly relies on the gravity of the prohibited conduct. A state cannot apply its law

⁹¹ Assuming, of course, that the purported terrorist had sufficient due process rights in this situation to raise a due process violation.

⁹² 472 U.S. 797, 821–22 (1985).

⁹³ See *Eisenfeld v. Islamic Republic of Iran*, 172 F. Supp. 2d 1, 7 (D.D.C. 2000) (arguing that state sponsors of terror cannot object to the exercise of personal jurisdiction over them because engaging in this prohibited conduct risks the injury of nationals of that state).

⁹⁴ The Due Process Clause has been found to limit a state's ability to regulate contracts operative wholly outside its territory simply because one party was a state citizen. See *Hartford Accident & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143, 149 (1934).

extraterritorially to activity less morally repugnant than terrorism based on passive personality. This raises a serious question about whether the U.S. should sanction passive personality as a loosening of the pervasiveness required to give rise to universal jurisdiction. Once the issues of notice are examined, it becomes clear that the use of passive personality for terrorism requires viewing it as more unacceptable than other conduct, while trying to avoid the commonality of the prohibition that exercise of universal jurisdiction requires.

Lastly, passive personality remains controversial because other countries must accept the principle's validity before a successful prosecution or lawsuit can occur. For criminal prosecutions, states asserting passive personality may often find that the other state would refuse to extradite because of the weak relationship between the incident and the state attempting to apply its laws.⁹⁵ For civil cases, this may take the form of the state refusing to recognize or enforce judgments based on passive personality. A further complication will be the collection of evidence. Because the terrorist attacks at the focus of the prosecution or lawsuit will have occurred abroad, foreign governments that do not recognize passive personality may refuse to assist the U.S. or civil litigants in needed discovery.⁹⁶ Adopting a narrower basis can assure other countries that the U.S. has a strong interest in applying its own law.

2. *United States v. Yunis*: How Congress and the Courts Added Universal Jurisdiction to Passive Personality To Get Antiterrorism Law

The limitations on protective jurisdiction and the difficulty in showing the consensus of need for universal jurisdiction have forced the courts and Congress to adopt passive personality as a half-step to universal jurisdiction and a half-step from protective jurisdiction. The case of *United States v. Yunis*⁹⁷ highlights the difficulties in finding an appropriate jurisdictional basis.

In one of the earliest domestic counterterrorism cases, the federal judiciary recognized the limited usefulness of the protective principle—something Congress later ignored. In *Yunis*, the government prosecuted Fawaz Yunis for the hijacking

⁹⁵ See Watson, *supra* note 44, at 24–26 & n.118.

⁹⁶ See *id.* at 29.

⁹⁷ 681 F. Supp. 896 (D.D.C. 1988), *aff'd*, 924 F.2d 1086 (D.C. Cir. 1991).

of a Jordanian Airliner in the Middle East.⁹⁸ Judge Parker evaluated whether the *Charming Betsy* presumption that Congress does not violate international law without a clear statement of its intent required limiting the scope of a statute criminalizing airplane hijacking.⁹⁹ Judge Parker found that theories of universal jurisdiction and passive personality jurisdiction supported the extraterritorial application of U.S. antiterrorism law but that protective jurisdiction did not.¹⁰⁰ The reason for refusing to apply protective jurisdiction was that an attack on a private airliner does not intend to disrupt important governmental functions.¹⁰¹ The case highlights both the limited nature of the protective principle and that justifying the U.S.'s antiterrorism statutes requires mashing together universal jurisdiction and passive personality.

Arguably, Judge Parker rightly finds that the universality principle supports jurisdiction for this particular act because the widely accepted airplane hijacking convention, implicated in that case, reflects a global norm of definite content.¹⁰² However, without the convention, universal jurisdiction would not allow for the prosecution, as there is no general antiterrorism customary international law.

Judge Parker went on to find that passive personality also supports jurisdiction over terrorist acts.¹⁰³ Noting that the Restatement allows for jurisdiction based on a state's nationals being targeted due to their nationality, Judge Parker dismissed any general concern over passive personality's validity because "qualified application of the doctrine to serious and universally condemned crimes will not raise the specter of unlimited and unexpected criminal liability."¹⁰⁴ Judge Parker used recognition of jurisdiction when nationals of a country are targeted because of their nationality, while also relying on universal

⁹⁸ *Id.* at 898.

⁹⁹ *See id.* at 899.

¹⁰⁰ *Id.* at 903 & n14.

¹⁰¹ *See id.*

¹⁰² *See id.* at 901; *see also* Adam W. Wegner, *Extraterritorial Jurisdiction Under International Law: The Yunis Decision as a Model for the Prosecution of Terrorists in U.S. Courts*, 22 LAW & POL'Y INT'L BUS. 409, 420-25 & 438 (1991) (praising the decision's offense-specific analysis of international law with respect to universal jurisdiction).

¹⁰³ *Yunis*, 681 F. Supp. at 902.

¹⁰⁴ *Id.*

condemnation—the focus of universal jurisdiction—to justify passive personality jurisdiction for all attacks injuring U.S. nationals, regardless of the intent of the attacker.¹⁰⁵ Much like Congress has done, the *Yunis* decision hastily adds the limited cases where a widely ratified international treaty addresses terrorist activity to the cases where U.S. nationals are targeted due to their nationality to justify the application of U.S. law to all types of terrorist attacks injuring U.S. nationals, a sum much greater than its two purported parts. The *Yunis* decision is an example of the use of the broad definition of passive personality in U.S. antiterrorism law that failed to treat passive personality as more than a half-step to universal jurisdiction.

II. SUING TERRORISTS IN U.S. COURTS: OVERLY BROAD SUBSTANTIVE LAW TEMPERED BY UNDULY RESTRICTIVE PROCEDURES

The lack of a suitable basis of prescriptive jurisdiction for unconventional security threats is an acute problem for both civil and criminal U.S. antiterrorism statutes. However, the civil provisions of antiterrorism laws present greater problems than the criminal provisions. The use of passive personality results in overly broad substantive law, which courts then attempt to temper by the use of procedural doctrines. These doctrines are not a factor in criminal prosecutions. Thus, some civil suits furthering U.S. interests are dismissed. Unlike criminal prosecutions, no limited group of governmental actors can

¹⁰⁵ Others have similarly tried to justify the use of passive personality by trying to attach it to a general acceptance that terrorist acts are the proper subject of greater extraterritorial regulations. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 cmt. g (1987) (allowing passive personality only for terrorism); John G. McCarthy, Note, *The Passive Personality Principle and Its Use in Combatting International Terrorism*, 13 FORDHAM INT'L L.J. 298, 318–21 (1990) (adopting Restatement approach in arguing that a consensus should be formed that passive personality can be used for terrorist attacks that target a country's nationals). The problem with such views is that once a consensus that terrorism can and should be punished exists, the concept of universal jurisdiction provides the justification, not passive personality. Passive personality at most acts as a proviso limiting universal jurisdiction, similar to how the Draft Convention used the idea. See *supra* notes 37–41 and accompanying text. Such proposals fail because the consensus against all but a few types of terrorism is not strong enough to allow for universal jurisdiction, and thus the justification for allowing the application of the principle only for terrorism is severely weakened.

exercises discretion in a organized manner to match prosecutions to cases where the U.S. has security interests. This means that many civil suits can proceed that lack a U.S. interest, while others involving U.S. interests are unsuccessful.

A. *Causes of Action: A Patchwork of Authorizations To Sue Terrorists*

Civil litigation over terrorist acts has attracted a lot of attention lately.¹⁰⁶ But, the movement to impose civil liability for acts of international terrorism began well before terrorism became one of the foremost national security issues of the United States.¹⁰⁷ The first civil antiterrorism statutes began with Congress allowing victims of specific international incidents to seek compensation.¹⁰⁸ However, unless Congress had passed an incident-specific act, victims often found it difficult to successfully recover. The divergent results of suits for international acts of terrorism in the 1980s motivated Congress to pass general civil antiterrorism legislation. Prior to the passage of the Antiterrorism Act of 1990, plaintiffs in civil lawsuits for acts of international terrorism faced difficulties due to the lack of a terrorism-specific cause of action, which Congress remedied with the passage of the Antiterrorism Act.

1. Terrorism Becomes a Tort: The Antiterrorism Act

The Antiterrorism Act of 1990 provides the broadest cause of action against international terrorists. Plaintiffs have attempted to use the ATA for acts including the September 11 attacks,¹⁰⁹

¹⁰⁶ See generally CIVIL LITIGATION AGAINST TERRORISM *supra* note 63.

¹⁰⁷ However, it did not predate the idea of a "War on Terror." The sponsor of one of the major civil terrorism litigation bills called the struggle "the war against terrorism." See 1990 ATA Hearing, *supra* note 57, at 54 (statement of Sen. Grassley).

¹⁰⁸ See Jennifer A. Rosenfeld, Note, *The Antiterrorism Act of 1990: Bringing International Terrorists to Justice the American Way*, 15 SUFFOLK TRANSNAT'L L.J. 726, 732-35 (1992) ("Historically, American victims of terrorist acts abroad had been legally defenseless unless they were designated as compensable victims under relief statutes covering the specific terrorist incident."). The most notable instance was the Hostage Relief Act of 1980, which allowed compensation to those held hostage at the American Embassy during the Iranian Revolution. *Id.* at 732 n.21.

¹⁰⁹ See *In re Terrorist Attacks on Sept. 11, 2001*, 349 F. Supp. 2d 765, 836-37 (S.D.N.Y. 2005), *aff'd*, 538 F.3d 71 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 2859 (2009) (denying motions to dismiss ATA claims against charities that allegedly funded al-Qaeda); *accord* *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 105, 107 (D.D.C. 2003). Note, however, that the *September 11* plaintiffs have faced challenges in establishing an exception to sovereign immunity and establishing personal

attacks by Hamas and the Palestine Liberation Organization ("PLO") in Israeli territory,¹¹⁰ bombing of U.S. embassies,¹¹¹ and attacks on U.S. military personnel by al-Qaeda abroad.¹¹²

The ATA allows recovery of treble damages for any act of international terrorism that injures a U.S. national's person, property, or business.¹¹³ Property damage is only actionable if it is against property of the U.S. government or its agency or department.¹¹⁴ Activities must meet three requirements to be considered acts of international terrorism.

First, the activities must involve violent or dangerous acts that are or would be criminal under any federal criminal law or law of a state if that terrorist act had theoretically been committed in the United States or any state of the union.¹¹⁵ Due to the range of federal and state criminal law, the first requirement of the ATA could likely be satisfied by almost any violent or dangerous act.

Secondly, the acts must "appear to be intended" to intimidate or coerce a civilian population, to influence the policy of a government by intimidation or coercion, or to affect the of a government by mass destruction, assassination, or kidnapping.¹¹⁶ This relevant population or government can be any government or population and not just that of the U.S. In

jurisdiction over the defendants. *See In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d at 95–96 (finding that many defendants were either immune or not subject to personal jurisdiction).

¹¹⁰ *See Ungar v. Palestinian Liberation Org.*, 402 F.3d 274, 276 (1st Cir. 2005) (evaluating claims that the ATA applied to attacks by Hamas gunman on Israeli cars killing an American national); *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1001–02 (7th Cir. 2002) (evaluating claims that Hamas gunman shot an American student studying in Israel as he waited for the bus); *Knox v. Palestinian Liberation Org.*, 306 F. Supp. 2d 424, 426–27 (S.D.N.Y. 2004).

¹¹¹ *See In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 93, 102 (2d Cir. 2008); *Mwani v. bin Laden*, 417 F.3d 1, 4 (D.C. Cir. 2005) (hearing claim against Osama bin Laden for bombings of U.S. embassies in Kenya and Tanzania).

¹¹² *See Morris v. Khadr*, 415 F. Supp. 2d 1323, 1326 (D. Utah 2006) (evaluating claim against al-Qaeda member who committed a terrorist act against U.S. soldiers in Afghanistan); *Estate of Heiser v. Islamic Republic of Iran*, 466 F. Supp. 2d 229, 265 (D.D.C. 2006) (finding Iran liable for attacks on Khobar Towers in Saudi Arabia).

¹¹³ 18 U.S.C. § 2333(a) (2006).

¹¹⁴ *Id.* § 2332b(b)(1)(D).

¹¹⁵ *Id.* § 2331(1)(A).

¹¹⁶ *Id.* § 2331(1)(B).

contrast, the proposed intent-based framework would limit the terrorist acts giving rise to a claim under U.S. law to those intended to harm the U.S. or its nationals.

Lastly, to differentiate it from domestic terrorism, the activities must either occur primarily outside the territorial jurisdiction of the United States or transcend national boundaries due to the means used, people targeted, or locale the actors operated within.¹¹⁷

The scope of liability does not include some secondary conduct, such as aiding and abetting, unless it also qualifies as lending “material support” to terrorists, a primary offense under the ATA. The few courts that have addressed whether the ATA applies to the conduct of lending material support found that liability can be imposed provided that each element is satisfied for the conduct at issue.¹¹⁸ These same courts held that the ATA does not allow for “secondary liability” such as aiding and abetting or conspiracy to commit an act of terrorism.¹¹⁹ However, traditional aiding and abetting-type conduct can constitute materially supporting terrorist activity in certain circumstances.¹²⁰

a. *The Antiterrorism Act's Goals: Balancing Counterterrorism and Compensation*

Congress created the ATA in response to several high profile cases, where plaintiffs' recovery seemed doubtful: the hijacking of the *Achille Lauro* and the bombing of Pan Am Flight 103.¹²¹ In 1985, members of the Palestine Liberation Organization hijacked the cruise ship *Achille Lauro*.¹²² During the hijacking, PLO

¹¹⁷ *Id.* § 2331(1)(C).

¹¹⁸ See Jack Goldsmith & Ryan Goodman, *U.S. Civil Litigation and International Terrorism*, in *CIVIL LITIGATION AGAINST TERRORISM*, *supra* note 63, at 109, 121–22. The leading case on the issue found that material support with intent could be a basis for liability under the ATA but that funding simpliciter did not support liability. *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1012, 1024 (7th Cir. 2002).

¹¹⁹ *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 689 (7th Cir. 2008).

¹²⁰ *Id.* at 692.

¹²¹ *1990 ATA Hearing*, *supra* note 57, at 2–3 (1990) (statement of Sen. Grassley) (noting that successes of prior plaintiffs such as those in the two incidents were “not definitive” and that the ATA “empowers the victims of terrorism to seek justice”).

¹²² *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 937 F.2d 44, 47 (2d Cir. 1991).

members shot the wheelchair-bound Leon Klinghoffer, a Jewish American, and threw his body overboard.¹²³ Klinghoffer's heirs successfully sued the PLO in federal court despite uncertainty over the propriety of applying U.S. tort principles to extraterritorial acts of terrorism.¹²⁴

In contrast, the family members of the victims from the bombing of Flight 103 had little success in bringing suit against the perpetrators of the bombing before the passage of the ATA. Following the bombing, the victims received a settlement offer from Pan Am for compensation and received interest from attorneys willing to sue Pan Am or the U.S. Government.¹²⁵ However, they were unable to find any attorneys or donors willing to fund an investigation into the source of the attack or willing to sue the perpetrators of the bombing.¹²⁶ The families of the victims of Flight 103 pushed for the ATA's passage in order to clearly establish an avenue of legal action for the families against those who actually committed the bombing.¹²⁷

The main purposes of the ATA were to compensate victims and supplement criminal enforcement when the alleged terrorist could not be brought into court to face criminal charges.¹²⁸ The ATA's sponsors intended to do this by "remov[ing] the jurisdictional hurdles in the courts confronting victims and [empowering] victims with all the weapons available in civil litigation."¹²⁹ Congress first passed the Act so that "American civil law would be granted the same extra-territorial reach as American criminal law," which reached any international terrorist act that injured a U.S. national.¹³⁰ The legislative history of the bill casts this supplementation of the criminal statutes as driven by both a desire to compensate victims¹³¹ and a wish to supplement criminal charges in a comprehensive

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ ALLAN GERSON & JERRY ADLER, *THE PRICE OF TERROR* 47 (2001).

¹²⁶ *Id.*

¹²⁷ See *1990 ATA Hearing, supra* note 57, at 70–71 (statement of Paul S. Hudson, Chairman, Families of Pan Am 103/Lockerbie).

¹²⁸ 138 Cong. Rec. 33628–29 (1992) (statement of Sen. Grassley).

¹²⁹ 137 Cong. Rec. 8143 (1991) (statement of Sen. Grassley).

¹³⁰ H.R. REP. NO. 102-1040, at 5 (1992).

¹³¹ See *1990 ATA Hearing, supra* note 57, at 12 (statement of Alan J. Kreczko, Deputy Legal Advisor, Dep't of State) ("While we have made a start in prosecuting the perpetrators of terrorist acts, it is still unfortunately the case that victims of terrorism generally remain uncompensated.").

antiterrorism strategy.¹³² At the time the ATA was passed, Congress was aware of the limits of the criminal justice system to combat terrorism because of the difficulty in capturing or extraditing terrorists,¹³³ the higher standard of proof required for a criminal conviction,¹³⁴ and the failures of the law enforcement agencies to adequately respond to acts of international terrorism.¹³⁵ Congressional hearings highlighted the fact that the *Klinghoffer* case had resulted in the deposition of a high-ranking PLO member.¹³⁶ This deposition brought to light startling information on the PLO's activity in the U.S., of which the government had not been previously aware.¹³⁷ Thus, Congress contemplated the idea of using civil litigation as a national security tool when it considered the ATA, even though compensation was probably a more prominent reason for enacting the legislation.

b. Drawing the Extraterritorial Line: Securing Nationals as National Security

Contrary to the current tendency to view the "War on Terror" as beginning on September 11, in the late 1980s and 1990s, Congress wished to establish a legal regime outlawing

¹³² See *id.* ("The existence of such cause of action may deter terrorist groups from maintaining assets in the United States . . . and from soliciting funds from within the United States.").

¹³³ See *id.* (statement of Steven R. Valentine, Deputy Assistant Att'y Gen., Civil Div.) (noting that the perpetrators of an airline hijacking that resulted in the death of a Navy serviceman were still at large, except for one potential defendant, who West Germany had refused to extradite, while the Italian government refused to extradite the hijackers of the *Achille Lauro*).

¹³⁴ See *id.* at 18 (statement of Alan J. Kreczko, Deputy Legal Advisor, Department of State) ("[T]he bill may be useful in situations in which the rules of evidence or standards of proof preclude the U.S. government from effectively prosecuting a criminal case in U.S. Courts.").

¹³⁵ One year before passage of the ATA, Congress held hearings on the mysterious plane crash that killed the Pakistani President Zia-Ul-Haq and U.S. Ambassador to Pakistan. See *Extraterritorial Jurisdiction over Terrorists Acts Abroad: Hearings Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 101st Cong. 1-4 (1989) (statements of Rep. Hughes and Rep. McCollum). The hearings addressed the failure of the U.S. to investigate the crash, which was partially due to State Department officials ordering the FBI not to enter Pakistan. *Id.* at 3-4.

¹³⁶ See *1990 ATA Hearing*, *supra* note 57, at 50-51 (question of Sen. Grassley to John De Pue, Counselor to the Assistant Att'y Gen., Criminal Div.) (noting that the deposition was a key piece of evidence to which De Pue replied was found independently).

¹³⁷ *Id.* at 50.

terrorist acts similar to customary international law's prohibition on piracy. The ATA represents Congress's first attempt towards establishing such a regime regarding civil liability, which gained little traction internationally due to the failure of the international community to agree on what conduct constitutes "terrorism." The broad scope of the ATA appears to be unsustainable in light of the failure to create an international antiterrorism norm.

In presenting the ATA, its sponsors conflated attacks that injured American nationals and those directed at American nationals.¹³⁸ The distinction lies at the heart of the extraterritorial application of the ATA. The language of the statute reflects a broader application of U.S. law to all terrorist attacks that injure U.S. nationals, while the legislative history of the bill mentions a desire to prevent attacks *directed at* U.S. nationals by use of "protective jurisdiction."¹³⁹ As shown above, protective jurisdiction requires intent to impair an important government function.¹⁴⁰ This is a requirement the language of the ATA lacks. In further support of a broader reading of the ATA's extraterritoriality, proponents claimed a desire to eliminate the use of terrorist tactics globally¹⁴¹ and intended for the ATA to help prompt the formation of a global antiterrorism norm. The broadest liability possible would further these universalities' interests. Despite the ATA's potential breadth, testimony before the Judiciary Subcommittee considering the bill highlighted the fact that it would likely be rarely used.¹⁴²

¹³⁸ *Id.* at 2 (statement of Sen. Grassley) (stating that the victims of the attack "died because they were Americans"); *id.* at 3 (statement of Sen. Thurmond) ("This legislation will provide a new civil cause of action in Federal court for acts of international terrorism directed at U.S. nationals."). *But see id.* at 49 (statement of Sen. Heflin) (expressing concern with "the rise in attacks involving innocent bystanders").

¹³⁹ 132 Cong. Rec. 2355-59 (1986) (remarks of Sen. Specter).

¹⁴⁰ See BLAKESLEY, *supra* note 6, at 115 n.224; *supra* Part I.5.

¹⁴¹ 1990 ATA Hearing, *supra* note 57, at 4 (statement of Sen. Thurmond) ("Terrorism of any kind cannot be tolerated.").

¹⁴² A representative of the Department of State did not expect the ATA to be invoked often:

It may be that, as a practical matter, there are not very many circumstances in which the law can be employed. To our knowledge . . . few terrorist organizations are likely to have cash assets or property located in the United States that could be attached and used to fulfill a civil judgment.

Id. at 17 (statement of Alan J. Kreczko, Deputy Legal Advisor, Dep't of State).

Thus, the legislative statements indicate a desire to reconcile different views by fudging the distinctions between the different bases of jurisdiction, similar to *United States v. Yunis*. First, Congress justified the laws as protecting victims “who died because they were Americans.”¹⁴³ Second, Congress wanted to eliminate terrorism worldwide, but international law had failed to develop as Congress wanted. Thus, Congress likely settled on legislating against attacks based on the victim’s U.S. nationality, a concept the U.S. generally opposed in other areas,¹⁴⁴ as a compromise that would encompass attacks specifically directed at Americans but that was broad enough to further certain members’ universalist goals.

Plaintiffs have options other than the ATA to bring claims arising out of terrorist acts that are not limited to suits by U.S. nationals. Yet, the alternatives to the ATA do not establish the broad liability that the ATA does, in both the swath of conduct that gives rise to a claim and their extraterritorial reach.

2. Terrorism as a Predicate Felony for RICO’s Civil Provisions: A Law of Unclear Potential

Following amendments contained in the USA PATRIOT Act,¹⁴⁵ the Racketeer Influenced and Corrupt Organizations Act (“RICO”) now allows civil suits¹⁴⁶ against those who participate in racketeering enterprises that affect interstate commerce.¹⁴⁷ The amendment expanded RICO’s predicate felonies to include many federal crimes related to terrorism, including, *inter alia*, financing and providing material support.¹⁴⁸

It would seem that civil liability for terrorism under RICO after the Amendment would be as broad as that under the ATA because conduct violating the ATA provides the predicate criminal acts for RICO purposes. Nevertheless, plaintiffs have been unsuccessful in pleading RICO claims for terrorist acts both

¹⁴³ *Id.* at 2 (statement of Sen. Grassley).

¹⁴⁴ See Robinson, *supra* note 45, at 488–91 (noting the various points at which the U.S. opposed other countries’ use of the nationality of the victim).

¹⁴⁵ USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 813, 115 Stat. 272, 382.

¹⁴⁶ See 18 U.S.C. § 1964(c) (2006) (allowing civil suit for a violation of RICO’s criminal provisions).

¹⁴⁷ *Id.* § 1962(b). See generally Goldsmith & Goodman, *supra* note 118, at 123–25.

¹⁴⁸ See 18 U.S.C. § 1961(1) (including offenses listed in 18 U.S.C. § 2332b(g)(5)(B) as predicate felonies).

at home and abroad. The difficulty lies in a potentially more limited extraterritorial reach, a limitation on corporate liability for noncentral actors, and the general difficulties in showing a criminal enterprise.¹⁴⁹

RICO's civil liability may only reach conduct that has significant ties with the United States, in contrast to the ATA. The extraterritoriality of RICO remains a matter of dispute among courts. The prevailing view applies either the conduct test or the effects test to determine whether or not RICO applies to conduct outside the United States.¹⁵⁰ The conduct test allows RICO to apply extraterritorially to all conduct when some material conduct leading to the injury occurs within the United States. The effects test allows for extraterritorial application of RICO when the activity is both intended to and does have a substantial and direct effect within the United States. Although, in theory, these "territorial" bases are more limited than other jurisdictional bases, in practice, these tests can reach quite far if applied loosely. For example, some courts have been less than dutiful in requiring a direct and intended effect, allowing mere knowledge of attenuated effects to satisfy the effects test.¹⁵¹ At the other extreme, one court has refused to apply RICO extraterritorially at all.¹⁵² RICO thus may apply to less than all the potential terrorist acts that harm U.S. interests due to its territorial limitations.

¹⁴⁹ See *In re Terrorist Attacks on September 11, 2001*, 349 F. Supp. 2d 765, 827–28 (S.D.N.Y. 2005), *aff'd*, 538 F.3d 71 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 2859 (2009) (dismissing RICO claims against banks and charities, which allegedly helped fund al-Qaeda); *Dubai Islamic Bank v. Citibank, N.A.*, 256 F. Supp. 2d 158, 163–64 (S.D.N.Y. 2003) (finding that plaintiffs failed to adequately plead bank was a "central figure" in criminal enterprise of money laundering).

¹⁵⁰ See *Doe I v. State of Israel*, 400 F. Supp. 2d 86, 115–16 (D.D.C. 2005) ("The activity at issue must, at minimum, produce or be intended to produce effects in this country."); *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538, 555–56 (S.D.N.Y. 2004) (finding conduct and effects tests not satisfied in that situation); *United States v. Noriega*, 746 F. Supp. 1506, 1517 (S.D. Fla. 1990) (applying effects test); see generally Eric Engle, *Extraterritorial Corporate Criminal Liability: A Remedy for Human Rights Violations?*, 20 ST. JOHN'S J. LEGAL COMMENT. 287, 320–23 (2006).

¹⁵¹ See *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 CIV. 8386(KMW), 2002 WL 319887, at *22 (S.D.N.Y. Feb. 28, 2002) (finding that allegations of bribery and suborning human rights abuses in exploiting oil fields in Nigeria had a sufficiently direct effect in the United States when forty percent of Nigeria's oil is exported to the United States).

¹⁵² See *Jose v. M/V Fir Grove*, 801 F. Supp. 349, 357 (D. Or. 1991) (holding that RICO does not apply extraterritorially).

One could argue that the USA PATRIOT Act Amendments to RICO require expanding RICO's extraterritorial reach. Many courts have stated that RICO should be "liberally construed to effectuate its remedial purpose."¹⁵³ Arguably, RICO's civil provisions should reach as far as the criminal provision against terrorism that the USA PATRIOT Act added to the list of the predicate offenses. However, no court has yet given it such a construction, nor does the legislative history provide a clear congressional intent that would indicate a disapproval of the prior construction given to RICO.¹⁵⁴ In fact, the legislative history implies that Congress neither considered the impact of the amendment on RICO's civil provisions, nor did it intend that the terrorist predicates would result in a different operation of the RICO statute.¹⁵⁵ At the very least, its extraterritorial reach will remain controversial for the near future.

Besides the difficulty in overcoming the extraterritorial application of the civil RICO provisions, courts have been reluctant to apply RICO to corporations not considered essential members of terrorist enterprises. For example, banks that were used to funnel money for racketeering activities under RICO may not be vicariously liable, even if their employees had knowledge that the money was used for criminal activities, unless the employees were "central figure[s]" or "aggressor[s]" in the scheme.¹⁵⁶ The "central figure" requirement for RICO severely

¹⁵³ *Doe I*, 400 F. Supp. 2d at 115 (quoting Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970); *United States v. Kaye*, 556 F.2d 855, 859 (7th Cir. 1977)).

¹⁵⁴ Given the scope of the bill and speed at which it was passed, the legislative history contains little reference to the RICO provisions, merely stating:

Both the House and Senate bills included this provision to amend the RICO statute to include certain terrorism-related offenses within the definition of "racketeering activity," thus allowing multiple acts of terrorism to be charged as a pattern of racketeering for RICO purposes. This section expands the ability of prosecutors to prosecute members of established, ongoing terrorist organizations that present the threat of continuity that the RICO statute was designed to permit prosecutors to combat.

147 CONG. REC. 20694 (2001) (Statement of Sen. Leahy) (introducing for the Record a section-by-section analysis of the bill in lieu of a report).

¹⁵⁵ *Id.*

¹⁵⁶ See *Dubai Islamic Bank v. Citibank, N.A.*, 256 F. Supp. 2d 158, 165 (S.D.N.Y. 2003) (dismissing money laundering claims against a bank, whose employees allegedly knew they were aiding a fraudulent conspiracy).

limits plaintiffs from using RICO to target the web of charities and corporations that may have been involved in financing terrorist acts.¹⁵⁷

Thus, despite the claimed potential for RICO civil actions against acts of terrorism, its application is limited to terrorist acts with substantial effects in the U.S. and only against the "central figures" of the terrorist enterprise. The ATA remains a more promising cause of action for American citizens.

3. Suits Against State Sponsors of Terror: The Search for a Cause of Action

Until recent Congressional action, the existence of a cause of action against state sponsors of terrorism was much debated. Many cases, most notably several cases from the D.C. district court, had found that the act that removes foreign state sovereign immunity in suits for state sponsors of terrorism, besides simply abrogating sovereign immunity, also created a cause of action.¹⁵⁸ However, the D.C. Circuit rejected this line of cases in 2004.¹⁵⁹ The rejection of an implied cause of action threatened to severely limit plaintiffs' available causes of action against state sponsors of terrorism due to the lack of other alternatives.¹⁶⁰ Because the ATA cannot apply to foreign states,¹⁶¹ victims of state-sponsored terrorism were forced to rely on two other statutes that recognize torts in violation of international law. Congress recently created a cause of action for victims of state-sponsored terrorist acts, provided that the victim is a national of the U.S., member of the U.S. military, or otherwise employed by the U.S. or performing a contract awarded

¹⁵⁷ See *In re Terrorist Attacks on September 11, 2001*, 349 F. Supp. 2d 765, 827–28 (S.D.N.Y. 2005) (alleging, unsuccessfully, that charities and corporations that were conduits for terrorist financing were liable under RICO).

¹⁵⁸ See e.g., *Price v. Socialist People's Libyan Arab Jamahiriya*, 274 F. Supp. 2d 20, 30–32 (D.D.C. 2003); see also Debra M. Strauss, *Enlisting the U.S. Courts in a New Front: Dismantling the International Business Holdings of Terrorist Groups Through Federal Statutory and Common Law Suits*, 38 VAND. J. TRANSNAT'L L. 679, 706–09 (2005) (analyzing wealth of terrorism cases recently addressed by the courts of D.C.).

¹⁵⁹ *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1027 (D.C. Cir. 2004).

¹⁶⁰ See Strauss, *supra* note 158, at 708–09.

¹⁶¹ *Id.*

by the U.S. government.¹⁶² Additionally, the cause of action only allows suits against designated state sponsors of terrorism, and so the cause of action against foreign states remains limited despite Congress clarifying its existence.¹⁶³

4. Causes of Action Deriving from Domestic Recognition of International Law

Although many commentators have called for acts of terrorism to be considered violations of customary international law,¹⁶⁴ the actual private causes of action allowed by U.S. courts for violations of international law are more limited. Two statutes can be used to establish liability for acts of terrorism that violate the “law of nations”: the Alien Tort Claims Act and the Torture Victims Protection Act.

a. The Alien Tort Claim Act: Arguing That Terrorism Is an International Tort

First, the Alien Tort Claims Act (“ATCA”) allows suit by *foreign* nationals for violations of the laws of nations (customary international law) or a treaty of the United States.¹⁶⁵ The number of these violations remains limited. The Supreme Court interpreted the ATCA as only authorizing new causes of action based on international laws with “a specificity comparable to the features of the 18th-century paradigms” of piracy, violation of safe conducts, and violation of the rights of ambassadors.¹⁶⁶

¹⁶² National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338-44. For a greater discussion of the impact of the Act, see Debra M. Strauss, *Reaching out to the International Community: Civil Lawsuits as the Common Ground in the Battle Against Terrorism*, 19 DUKE J. COMP. & INT'L LAW 307, 327-36 (2009).

¹⁶³ National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338-44.

¹⁶⁴ See Randall, *supra* note 63, at 103-04 (noting that there may be universal jurisdiction for civil actions arising from terrorist acts based on treaties and customary international law); see also BLAKESLEY, *supra* note 6, at 132-33 (stating that various treaties condemning certain terrorist acts and domestic criminal law of all countries “when considered as a whole, make it clear that terrorism—including hostage taking, kidnapping, intentional or wanton violence against innocent civilians—is often really a composite term that includes, or could be, any one of several separate universally condemned offenses”); Murphy, *supra* note 63, at 103-05 (calling for international convention to recognize and enforce civil judgments for terrorist acts).

¹⁶⁵ 28 U.S.C. § 1350 (2006).

¹⁶⁶ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

"Terrorism," as defined by the ATA, lacks the "definite content and acceptance among civilized nations"¹⁶⁷ of these exemplars. Recent developments do not aid the universality position. For example, proponents of universal antiterrorist jurisdiction often point to U.N. Security Council Resolution 1373 ("Resolution 1373") and several antiterrorism treaties as *opinio juris* of a general antiterrorism norm.¹⁶⁸ Resolution 1373, passed shortly after the September 11 attacks, calls on states to work to prevent terrorist acts and punish those who engage in such acts.¹⁶⁹ However, Resolution 1373 avoids the hurdle that has stymied previous attempts at international cooperation: defining terrorism. Although the Resolution contains strong language about preventing "terrorism," Resolution 1373 fails to direct nations as to who is a terrorist and who is a "freedom fighter." At no point in the Resolution is the meaning of terrorism clarified. Part of the discussion in passing the ATA was that several attempts to negotiate international compacts for the enforcement of civil judgments against terrorist failed due to the inability to define terrorism in international law.¹⁷⁰ Recent developments, most notably Resolution 1373, do not alter the fact that international law does not prohibit "terrorism" due to the lack of an accepted definition. Thus if the ATCA is to support a cause of

¹⁶⁷ *Id.* at 732. The D.C. Circuit, when presented with the specific question of whether terrorism was actionable under the ATCA, found that terrorist attacks outside the scope of international conventions were not violations of the law of nations. See *Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542, 548-49 (D.D.C. 1981). Although, the Convention for the Suppression of Terrorist Bombings would now likely cover the bombing at issue in *Tel-Oren*. See Murphy, *supra* note 63, at 50-52.

¹⁶⁸ See Ruth Wedgwood, *Civil Remedies and Terrorism*, in CIVIL LITIGATION AGAINST TERRORISM, *supra* note 63, at 159, 169 ("Though no one supposes that a Security Council resolution would be enforced directly by national private attorneys general through a newly conceived international tort law, nonetheless the decision of September 28 can be taken as a redefinition of what it means to be culpable in a terrorist scheme."); Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J. 121, 179-80 (2007) ("The Resolution reaffirms a universal and unequivocal condemnation of terrorism . . .").

¹⁶⁹ See S.C. Res. 1373, ¶ 1-2, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

¹⁷⁰ See 1990 ATA Hearing, *supra* note 57, at 16 (statement of Alan J. Kreczko, Deputy Legal Advisor, Department of State) ("While we have made a start in prosecuting the perpetrators of terrorist acts, it is still unfortunately the case that victims of terrorism generally remain uncompensated.").

action, the activity at issue must violate an international norm of definite content and acceptance independent from a general prohibition on "terrorism."

Norms of definite content may exist in international law for a limited group of terroristic activities based on widely ratified treaties that could give rise to at least universal criminal jurisdiction.¹⁷¹ The strongest claim would be that terrorist acts constituting torture by foreign officials give rise to a cause of action under the ATCA because of the growing recognition of torture as an international tort cognizable under the ATCA.¹⁷² This requires showing purposeful infliction of severe pain and suffering for the purpose of obtaining information or a confession, inflicting punishment, coercion, or discrimination.¹⁷³ This definition of torture will exclude many terrorist acts because terrorist acts are often not committed under the color of law nor committed for those specified purposes.

International treaties that require prosecution for violent acts endangering the safety of an aircraft,¹⁷⁴ the unlawful seizure of an aircraft,¹⁷⁵ bombing of certain public areas,¹⁷⁶ hostage

¹⁷¹ See Colangelo, *supra* note 168, at 177–85 (arguing that "renouncing and fighting terrorist acts is regarded by states as fulfillment of an international legal obligation").

¹⁷² See *Kadic v. Karadz*, 70 F.3d 232, 242–43 (2d Cir. 1995). *But see Price v. Socialist People's Libyan Arab Jamahiraya*, 294 F.3d 82, 93–94 (D.C. Cir. 2002) (finding Libyan state conduct not severe enough to constitute torture).

¹⁷³ See *Price*, 294 F.3d at 91–93.

¹⁷⁴ See Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention), Sept. 23, 1971, 24 U.T.S. 565, 974 U.N.T.S. 178. The convention has 182 parties. See CENTER FOR NONPROLIFERATION STUDIES, INVENTORY OF INTERNATIONAL NONPROLIFERATION ORGANIZATION AND REGIMES 2009 EDITION 446–48 (2009), available at http://cns.miis.edu/inventory/pdfs/CNS_IONP_Inventory_2009_Edition.pdf.

¹⁷⁵ See Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention), Oct. 14, 1971, 22 U.T.S. 1641, 860 U.N.T.S. 105. 161 States are party to the convention. See CENTER FOR NONPROLIFERATION STUDIES, INVENTORY OF INTERNATIONAL NONPROLIFERATION ORGANIZATION AND REGIMES 2009 EDITION 443–46 (2009), available at http://cns.miis.edu/inventory/pdfs/CNS_IONP_Inventory_2009_Edition.pdf.

¹⁷⁶ See G.A. Res. 52/164, art. 2, ¶ 1, art. 4, U.N. Doc. A/RES/52/164 (Jan. 9, 1998) (defining bombing of "a place of public use, a State or government facility, a public transportation system or an infrastructure facility" as an offense which must be prohibited by domestic law). This convention has 161 parties. See CENTER FOR NONPROLIFERATION STUDIES, INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF TERRORIST BOMBINGS 1 (2009), available at <http://cns.miis.edu/inventory/pdfs/bomb.pdf>.

taking,¹⁷⁷ financing acts of terrorism prohibited in the other treaties,¹⁷⁸ and attacks on diplomats and other protected persons¹⁷⁹ have been widely ratified. These treaties could support finding that the specified prohibitions have become part of international customary law regarding universal jurisdiction. However, it would be difficult to say that the norm would cover general terroristic conduct not prohibited by these treaties.

Despite the widespread acceptance of these treaties, establishing a cause of action under the ATCA for violations of the treaties faces several challenges. First, most of the major antiterrorism treaties are not self-executing.¹⁸⁰ Given the length at which the *Sosa* Court went to limit new causes of action under the ATCA, the fact that the treaty reserves implementation may prevent the standard of conduct from being of the definite and universal character needed to justify allowing a private cause of action without a statute recognizing a specific cause of action. Second, liability under U.S. criminal law and the ATA extends far beyond the conduct international treaties criminalize.¹⁸¹

¹⁷⁷ See International Convention against the Taking of Hostages, June 3, 1983, T.I.A.S. 11081, 1316 U.N.T.S. 205. The Hostage Convention has 161 parties. OFFICE OF THE ASSISTANT LEGAL ADVISOR FOR TREATY AFFAIRS, *supra* note 70, at 446–47.

¹⁷⁸ See G.A. Res. 54/109, art. 1–3, U.N. Doc. A/RES/54/109 (Apr. 10, 2002). There are 160 signatories to the convention. CENTER FOR NONPROLIFERATION STUDIES, INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM 1 (2009), http://www.nti.org/e_research/official_docs/inventory/pdfs/finterr.pdf.

¹⁷⁹ See Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.T.S. 1975, 1035 U.N.T.S. 167. This convention has 146 parties. CENTER FOR NONPROLIFERATION STUDIES, *supra* note 176, at 1.

¹⁸⁰ See Goldsmith & Goodman, *supra* note 118, at 128–29 (noting the possible exception of the Montreal Convention).

¹⁸¹ The first general criminal antiterrorism provisions passed by Congress were intended to fill the gaps left between the antiterror treaties addressing specific types of conduct. Senator Specter, the proponent of the Terrorist Prosecution Act of 1985, which would eventually become the criminal provisions in the Omnibus Diplomatic Security and Antiterrorism Act of 1986, noted that the murder of a Navy diver that occurred after the hijacking of TWA Flight 847 would likely not be covered by antihijacking legislation then in effect pursuant to an international treaty. *Prosecution Authorization Hearings*, *supra* note 24, at 41 (statement of Sen. Specter); *id.* at 62 (statement of Hon. Abraham D. Sofaer, Legal Adviser, U.S. Department of State) (“[T]he bill fills a remaining gap in our current structure of criminal jurisdiction over acts of terrorism by making criminal violent acts committed against U.S. nationals.”); *id.* at 67 (noting that the killing of two American civilians at an embassy in El Salvador was not a crime but would have been had they been taken hostage). Nor do the treaties currently recognize criminal enterprise liability beyond accomplice liability (with the exception of the Bombing

Thus, relying on only universal norms would severely limit U.S. antiterrorism law. In addition, none of the major antiterrorist treaties recognizes a civil cause of action.¹⁸² Because criminal jurisdiction exists, some argue that finding civil liability would be uncontroversial,¹⁸³ but unlike in the United States, many countries do not treat private lawsuits as integral solutions to social problems.¹⁸⁴ Thus, private international law regarding terrorism remains almost wholly undeveloped. This could be a problem as *Sosa* left open the question of whether international law must recognize the offense as a tort or merely a crime.

b. *Torture Victim Protection Act: Causes of Action Exists for Acts of Terrorism Constituting Torture or Extrajudicial Killing*

The Torture Victim Protection Act ("TVPA")¹⁸⁵ creates a cause of action for U.S. nationals for acts of torture or extrajudicial killing committed under the color of law. It does not apply to the broad range of conduct that the ATCA provides a cause of action to remedy. Congress intended the TVPA to supplement the ATCA and it allows claims by U.S. nationals for torture similar to the claims allowed to aliens under the ATCA.¹⁸⁶ Unlike the ATCA, the TVPA requires that the plaintiff first

Convention and Financing Convention), and none recognize conspiracy liability. See Colangelo, *supra* note 168, at 187–88 (noting that liability under U.S. criminal law extends far beyond the scope of the major antiterrorist treaties).

¹⁸² Judge Bork's opinion in *Tel-Oren v. Libyan Arab Republic* would require such a finding. See 726 F.2d 774, 799 (D.C. Cir. 1984). Other circuits have not required international law provide a cause of action. Murphy, *supra* note 63, at 56.

¹⁸³ See Moore, *supra* note 67, at 10 (stating that a treaty providing civil liability "would not seem a stretch").

¹⁸⁴ See Samuel P. Baumgartner, *Is Transnational Litigation Different?*, 25 U. PA. J. INT'L ECON. L. 1297, 1350–53 (2004) (using German and U.S. approaches as a case study to show that transnational litigation can be affected by different conceptions of the role litigation plays in society). The debate over the Holocaust litigation that was filed in the U.S. highlights that the society's attitude towards litigation can be outcome determinative. Scholars have debated whether such litigation would have been successful elsewhere and, if not, why would other countries take different views on litigation over mass social wrongs. See Stephen B. Burbank, *The Roles of Litigation*, 80 WASH. U. L.Q. 705, 713–14 (2002) (summarizing debate between scholars over whether other countries' systems would be resistant due to a bias towards the economically powerful or merely because of a different view on the role of litigation).

¹⁸⁵ Torture Victim Protection Act of 1991, Pub. L. No. 102–256, 106 Stat. 73 (1992).

¹⁸⁶ Phillip Mariani, *Assessing the Proper Relationship Between the Alien Tort Statute and the Torture Victim Protection Act*, 156 U. PA. L. REV. 1383, 1392–93 (2008).

exhaust remedies in the state in “which the conduct giving rise to the claim occurred.”¹⁸⁷ Similar to the ATCA, the TVPA has limited potential in civil litigation over terrorism, but a few plaintiffs have been successful.¹⁸⁸ Its impact grew as plaintiffs looked for a cause of action against state sponsors of terrorism in the wake of the D.C. Circuit’s finding that the provision removing sovereign immunity for certain state sponsors of terror does not create a cause of action.¹⁸⁹ However, because Congress has since provided such a cause of action, the TVPA is unlikely to have much effect on civil litigation over terrorism acts in the future.

B. Despite Broad Substantive Provisions Authorizing Civil Litigation Against Terrorism, Procedural Doctrines Limit Plaintiffs’ Ability To Recover

Civil litigation over international acts of terrorism triggers a variety of doctrines that limit suit over international incidents in U.S. courts. Although the substantive law may seem to be expansive, the procedural hurdles of bringing suit in U.S. court have hamstrung litigants. Multiple scholars have noted that doctrines such as *forum non conveniens*, personal jurisdiction, and foreign sovereign immunity present serious challenges to those wishing to bring suit over international acts of terrorism.¹⁹⁰ These procedural limitations serve to curtail an overbroad substantive law. As one scholar has noted, even if international law allows exercise of jurisdiction based on the nationality of the victim, other doctrines should serve to provide meaningful limitations.¹⁹¹ Unfortunately, such limitations rarely account for the importance of certain civil suits to the national security interests of the United States.

¹⁸⁷ Torture Victim Protection Act § 2.

¹⁸⁸ See, e.g., *Weinstein v. Islamic Republic of Iran*, 184 F. Supp. 2d 13, 21 (D.D.C. 2002), *aff’d*, No. 04-5162, 2005 U.S. App. LEXIS 7062 (D.C. Cir. Apr. 22, 2005) (finding that the TVPA provided a cause of action against Iran for Iranian funding of Hamas activity that resulted in the extrajudicial killing of an American).

¹⁸⁹ See also *Strauss*, *supra* note 158, at 710 (noting that the ATCA and TVPA have been “underutilized” for cases of terrorism).

¹⁹⁰ See *id.* at 690–92; *Boyd*, *supra* note 69, at 16–17; Goldsmith & Goodman, *supra* note 118, at 115–19.

¹⁹¹ *Boyd*, *supra* note 69, at 7–8.

1. Forum Non Conveniens

The doctrine of forum non conveniens poses a potential barrier to foreign plaintiffs when an alternative forum can be identified. The doctrine balances a variety of private and public factors to determine if the domestic forum would be less suited than an alternative foreign forum.¹⁹² Plaintiffs suing in their home forums are entitled to greater deference than foreigners are¹⁹³ because the Supreme Court worried that international forum shopping could lead to plaintiffs always opting for litigation in the assumedly plaintiff-friendly U.S. system but likely did not want to displace American litigants. Forum non conveniens effectively requires a U.S. interest primarily for foreign nationals suing under the ATCA and RICO because of the presumption in favor of the U.S. forum for U.S. nationals.

However, the traditional public interest factors examine interests very different from the foreign policy and security interests of the United States. The “interests” affecting the reasonableness of litigating in a certain country are not the same interests involved when applying one’s laws to the conduct at issue.¹⁹⁴ The public interest factors in a forum non conveniens analysis have traditionally included issues of court congestion, burdening citizens in an unrelated forum with jury duty, the interest in having local controversies decided at home, the interest in applying applicable law, and the interest in avoiding conflict of laws.¹⁹⁵ In addition, the doctrine gives U.S. nationals a strong presumption in favor of a home forum, which fails to meaningfully temper the excesses of relying on nationality of the victim as a prescriptive jurisdictional basis. At the same time, foreign nationals injured in an attack directed at the U.S., which is the type of attack that most implicates U.S. security interests, could be barred from suing here, despite the fact that a lawsuit could bring to light information about threats to Americans.

¹⁹² Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 (1981).

¹⁹³ *Id.* at 255–56.

¹⁹⁴ At least one scholar has suggested that forum non conveniens helps to make exercise of universal jurisdiction “reasonable.” See Boyd, *supra* note 69, at 17–20. However, the argument fails to address whether the factors determining forum selection are relevant to selecting which countries’ laws can and should apply. Simply because a more convenient forum exists does not negate a state’s interest in having its law applied.

¹⁹⁵ Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508–09 (1947).

Although an inquiry such as whether a terrorist attack was directed at U.S. nationals does not necessarily fall outside the scope of the doctrine, the doctrine has not been traditionally understood to encompass such issues. The doctrine traditionally focused on the practicability and cost-effectiveness of trying foreign cases in the U.S., rather than the more general impact on society. For example, in *Guidi v. Inter-Continental Hotels Corp.*,¹⁹⁶ the Second Circuit considered a *forum non conveniens* motion in a case where three Americans were shot by a religious fanatic targeting foreign nationals in Egypt.¹⁹⁷ In reversing the district court's dismissal, the Second Circuit found that the personal emotional toll that would occur for the plaintiffs if they had to return to the country that was the site of the gruesome terrorist incident that killed their relatives was the decisive factor in favor of a U.S. forum.¹⁹⁸ The Second Circuit gave no thought to the fact that the U.S. has a strong interest in adjudicating a claim that U.S. citizens had been targeted abroad solely because of their status as U.S. nationals.

2. Foreign Sovereign Immunity Act

For suits against foreign states that are complicit in terrorist acts, the Foreign Sovereign Immunity Act ("FSIA") often represents the greatest bar to recovery. The FSIA determines whether a court has personal jurisdiction over the foreign country, whether subject matter jurisdiction exists, and whether the foreign state is immune.¹⁹⁹ The FSIA presumptively grants immunity to all foreign states.²⁰⁰ However, subject matter and personal jurisdiction exist once one of the enumerated exceptions to immunity applies to the incident at issue and sovereign immunity is abrogated.²⁰¹

The FSIA specifically removes immunity for international acts of torture, extrajudicial killing, aircraft sabotage, hostage taking, and material support for the same.²⁰² However, the waiver of immunity under this so-called "terrorism exception"

¹⁹⁶ 224 F.3d 142 (2d Cir. 2000).

¹⁹⁷ *Id.* at 143-44.

¹⁹⁸ *Id.* at 147-48.

¹⁹⁹ Boyd, *supra* note 69, at 27.

²⁰⁰ 28 U.S.C. § 1604 (2006).

²⁰¹ *See id.*

²⁰² *Id.* § 1605(7) (2006), *repealed by* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 3, 393-97.

requires that the executive designate the foreign state a state sponsor of terrorism²⁰³ and that the victim is a national of the United States.²⁰⁴ Currently, only four countries are listed as state sponsors of terror.²⁰⁵

There is also a question whether the “terrorism exception” provides the exclusive exception for acts of terrorism or whether other exceptions for commercial activity²⁰⁶ or a noncommercial tort with a sufficient nexus in the United States²⁰⁷ abrogate immunity for state-sponsored terrorist acts. In the most prominent decision on the issue, the Second Circuit dismissed the claims of those killed or injured in the September 11 attacks against Saudi Arabia and certain members of the Saudi Royal family because Saudi Arabia has not been named a state sponsor of terrorism.²⁰⁸ The Second Circuit found that the terrorism exception provides the exclusive exception to foreign sovereign immunity for terrorist acts.²⁰⁹ Thus, only four foreign states can be sued in the U.S. for terrorist acts they support. If even the September 11 attacks do not trigger a court to abrogate sovereign immunity under the nonterrorism related exceptions, only victims of the four recognized state sponsors of terror are likely to recover from state sponsors of terror.

3. Personal Jurisdiction

The doctrine of personal jurisdiction similarly requires plaintiffs to show that the defendants have a stronger nexus with the United States than simply the injury of a U.S. national. Victims of terrorism, like other plaintiffs, must satisfy both Rule 4 of the Federal Rules of Civil Procedure and the requirements of the Due Process Clause.²¹⁰ For state sponsors of terror, courts have frequently found the constitutional requirements of personal jurisdiction satisfied, assuming that sovereign immunity does not apply. However, plaintiffs wishing

²⁰³ See *id.* § 1605(7)(A).

²⁰⁴ *Id.* § 1605(7)(B)(ii).

²⁰⁵ U.S. DEPT OF STATE, STATE SPONSORS OF TERRORISM (2009), <http://www.state.gov/s/ct/c14151.htm>.

²⁰⁶ See 28 U.S.C. § 1605(a)(2).

²⁰⁷ *Id.* § 1605(a)(5).

²⁰⁸ See *In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 75 (2d Cir. 2008), *aff'd*, 538 F.3d 71 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 2859 (2009).

²⁰⁹ *Id.* at 90.

²¹⁰ See, e.g., *Eisenfeld v. Islamic Republic*, 172 F. Supp. 2d 1, 7 (D.D.C. 2000).

to obtain jurisdiction over private defendants have struggled to show the necessary contacts, unless the terrorist-defendants happened to coincidentally have unrelated contacts to the U.S.

Foreign states have generally been found subject to suit for two reasons (assuming the terrorist exception applies). First, some courts have relied on precedent relating to domestic states that declares states of the union cannot be a "person" for purposes of the Fifth Amendment.²¹¹ Thus, if the requirements of the waiver of immunity and exercise of statutory personal jurisdiction under the Foreign Sovereign Immunity Act are satisfied, a state is subject to suit. Second, the courts that have found that the Fifth Amendment does apply to foreign states have concluded that the FSIA requirements subsumed the constitutional requirement of minimum contacts.²¹² These courts reason that states have sufficient notice that killing a U.S. national via terrorist attack will result in being haled into court in the U.S.²¹³ Thus, exercises of jurisdiction under the FSIA are generally recognized as supporting personal jurisdiction over foreign nations, once immunity has been abrogated.

However, plaintiffs attempting to exercise jurisdiction over nonstate actors have encountered difficulties, despite the fact that private defendants' contacts to the U.S. are often identical to that of state sponsors of terror. As stated above, for state sponsors of terror, courts have said that states are on notice that sponsoring terrorist activity that risks injuring a U.S. national also risks U.S. litigation.²¹⁴ This notice from merely sponsoring terrorism provides the requisite minimum contacts such that exercise of jurisdiction over foreign countries does not offend the notions of "fair play and substantial justice" at the heart of a due process analysis.²¹⁵ In contrast, courts have found killing a U.S. national by terrorist attack insufficient for personal jurisdiction

²¹¹ See, e.g., *Flatow v. Islamic Republic*, 999 F. Supp. 1, 19 (D.D.C. 1998) (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 323–24 (1966)), *superseded by statute as recognized in* *Hegna v. Islamic Republic of Iran*, 2003 U.S. Dist. LEXIS 14039, at *13 (N.D. Ill. Aug 11, 2003) (finding that Iran did not have due process rights that exercise of personal jurisdiction would offend).

²¹² See, e.g., *Eisenfeld*, 172 F. Supp. 2d at 7 (finding that foreign state causing the death of a U.S. national has requisite minimum contacts and is put on notice that it would be haled into court there).

²¹³ *Id.*

²¹⁴ See *Flatow*, 999 F. Supp. at 23 (stating as such for state sponsors of terror).

²¹⁵ *Id.*

over nonstate terrorists, despite the fact that nonstate terrorists presumably have the same notice that state sponsors of terror have. In *Biton v. Palestinian Interim Self-Government Authority*,²¹⁶ the District of D.C. noted that there was “merit” to the argument that anyone committing a terrorist act should be on notice that their victim’s court system may seek to exert jurisdiction.²¹⁷ However, the *Biton* Court refused to find that the minimum contact test was subsumed within the ATA, in contrast to what courts had done by finding the minimum contact requirements for state sponsors of terror subsumed within the terrorist exception of the FSIA.²¹⁸ The *Biton* Court dismissed the complaints against individual members of the Palestinian Authority and the PLO.²¹⁹

When comparing the two sets of results regarding personal jurisdiction for the very same conduct, it becomes clear that the fact that the political branches control who is a state sponsor of terror is altering courts’ personal jurisdiction decisions. Currently, U.S. courts have jurisdiction over a foreign state that kills a U.S. national during a state-sponsored terrorist attack—even if the nationality of the victims was not clear before the attack—if they are one of the pariah states on the list of the state sponsors of terror.²²⁰ If a private person commits the very same act, they may not be subject to the jurisdiction of U.S. courts. Courts are likely influenced by the fact that only four states who have little contact with the U.S. have been named as official state sponsors of terrorism. This influence is shown by the startlingly divergent results for suits against private defendants when compared to the results of suits against official state sponsors of terror.

Victims of terrorism are not, however, without some advantages compared to other litigants. The ATA allows nationwide service of process and thus likely also a national

²¹⁶ 310 F. Supp. 2d 172 (D.D.C. 2004).

²¹⁷ *Id.* at 178.

²¹⁸ *Id.*

²¹⁹ *Id.* at 179; see also *Estates of Ungar ex rel. Strachman v. Palestinian Auth.*, 153 F. Supp. 2d 76 (D.R.I. 2001) (applying traditional minimum contacts analysis for individual plaintiffs).

²²⁰ See *Flatow v. Islamic Republic*, 999 F. Supp. 1, 22–23 (D.D.C. 1998); see also *Watson*, *supra* note 44, at 19.

minimum contacts test.²²¹ The Supreme Court has stated that conducting an intentional tortious act expressly aimed at the forum can constitute sufficient basis for jurisdiction.²²² Lower federal courts have allowed such jurisdiction against the terrorist who executes attacks against U.S. nationals abroad in order to put political pressure on the U.S. government,²²³ but some courts show a hesitance to apply this reasoning to those who allegedly finance or aid terrorists without directing their attacks.²²⁴ Plaintiffs attempting to sue in U.S. court for terrorist acts abroad must overcome the skepticism of the judiciary, shown by their resistance to find personal jurisdiction over private supporters of terrorist attacks abroad. Currently, personal jurisdiction doctrines along with other procedural limitations dilute the potential of civil actions to secure the U.S. and its nationals.

III. CIVIL LITIGATION AGAINST TERRORISM AS A TOOL IN THE UNITED STATES' NATIONAL SECURITY STRATEGY

Civil suits can supplement military actions, intelligence gathering, and criminal prosecution. Congress intended as much in passing the ATA. Despite some of the shortcomings of the current laws, civil litigation against terrorism can be a strong force to protect U.S. interests. There exists a potential new basis for extraterritorial jurisdiction—intent-based national security jurisdiction—that will both enhance the benefits of civil litigation against terrorists and sharpen the analytic framework regarding extraterritorial application of law. This Section summarizes the potential benefits of civil litigation and introduces a basis for extraterritorial jurisdiction that maximizes those benefits. This

²²¹ 18 U.S.C. §§ 2333–34 (2006); *see also* Strauss, *supra* note 158, at 684 (noting that the enactment of the ATA was intended to remove many jurisdictional hurdles).

²²² *Calder v. Jones*, 465 U.S. 783, 789–90 (1984).

²²³ *Morris v. Khadr*, 415 F. Supp. 2d 1323, 1334–36 (D. Utah 2006) (finding that personal jurisdiction existed over al-Qaeda member who committed a terrorist act against U.S. soldiers in Afghanistan); *Mwani v. bin Laden*, 417 F.3d 1, 13–14 (D.C. Cir. 2005) (finding personal jurisdiction over Osama bin Laden for bombings of U.S. embassies in Kenya and Tanzania).

²²⁴ *In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 93–96 (2d Cir. 2008), *aff'd*, 538 F.3d 71 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 2859 (2009) (dismissing claims against four Saudi princes who allegedly contributed to charities that funded the September 11 attacks because the allegations failed to include that the princes were aware that terrorist activities would be directed at the U.S.).

basis will increase U.S. security while keeping with the spirit of the established bases of jurisdiction law and will make the limits more practical for effective implementation by skeptical judges.

A. *The United States Needs Civil Litigation Against Terrorism To Supplement Criminal Enforcement and NonLegal Efforts*

Civil litigation can promote private monitoring of the development and financing of terrorist plots. Policymakers recognize that even with increased budgets, the ability of the national security apparatus will be finite.²²⁵ Private actors can help supplement the investigation of past terrorist acts and potentially provide information not discovered by the government. Private attorneys general can root out incipient anti-American terrorists, who may have tried to injure U.S. nationals in conduct abroad but do not yet have the operational capacity to attack U.S. soil or disrupt important U.S. government functions. There is precedent for the use of such litigation. Civil litigation has proved to be a tool against the growth of violent hate groups within the U.S. as a supplement to criminal action.²²⁶ Other proposals relating to terrorism have tried to harness the ability of private persons to supplement the national security apparatus with devices such as the controversial terrorist futures market.²²⁷ The *Klinghoffer* case²²⁸ and *September 11* litigation²²⁹ furnished information previously unknown by the U.S. government. With reform to align plaintiffs' interests with national security, the system can supplement other means of combating terrorism.

²²⁵ Barry R. Posen, *The Struggle Against Terrorism: Grand Strategy, Strategy, and Tactics*, INT'L SEC., Winter 2001–02, at 39, 55 (“The United States requires a strategy to guide its [antiterrorism] efforts, including the allocation of resources. That strategy must set priorities, because resources are scarce and this war will prove expensive.”).

²²⁶ Strauss, *supra* note 158, at 682 & n.7 (listing numerous large jury awards against hate groups).

²²⁷ See Robert Looney, *DARPA's Policy Analysis Market for Intelligence: Outside the Box or off the Wall?*, 2 STRATEGIC INSIGHTS, Sept. 2003, <http://www.nps.edu/Academics/centers/ccc/publications/OnlineJournal/2003/sept03/terrorism.html> (describing how the market would have worked).

²²⁸ *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 937 F.2d 44 (2d Cir. 1991).

²²⁹ Chris Mondics, *Another Tack in Terror-Financier Lawsuit*, PHILA. INQUIRER, Aug. 20, 2008, at A1 (noting that the September 11 litigation has brought to light connections between certain banks and terrorist activity).

The potential of civil litigation as a national security tool remains great. Civil litigation can serve to interrupt financing of terrorist activities, which remains a key requirement for terrorist groups.²³⁰ Information gathered from antiterrorism lawsuits can provide intelligence to the government on the sources of terrorist funding. Such information can also provide greater knowledge to the public about terrorist groups, which solidifies public support for the struggle against anti-American terrorist groups.²³¹ The monetary sanctions that civil judgments provide may deter actors with nonideological commitment to terrorists' causes, such as those who knowingly aid terrorists out of greed.²³² Plaintiffs in civil suits may in fact be much more likely to obtain judgments and evidence than the government while bringing a criminal suit.²³³ In addition, the Hague Evidence Convention, although highly limited, provides a method for the taking of evidence abroad in civil cases.²³⁴ At the very least, it will prevent those financing terrorism from gaining any benefit to holding assets within the United States for fear of civil lawsuits.

Enforcement of antiterrorism lawsuits remains a problem, but not an insurmountable one. Few terrorist groups keep assets in the U.S.²³⁵ Other countries may be resistant to enforcing U.S. judgments, even against terrorism groups.²³⁶ However, a more limited jurisdictional basis will likely increase and not decrease the willingness of other states to enforce these judgments. In addition, financiers and others who aid terrorism may be more likely to have assets in the U.S.²³⁷ In contrast to other types of

²³⁰ See Moore, *supra* note 67, at 7 (noting that "a key logistic requirement for terrorism is the financing . . . to effectively carry it out").

²³¹ *Id.* at 8 ("Telling the truth about terrorism as an antidote to the obfuscation and political warfare accompanying the terrorist operations is perhaps half of the battle required in winning the war against terrorism.").

²³² See Wedgwood, *supra* note 168, at 168–69 ("It is unrealistic to suppose that a person dedicated to jihad is going to be affected by financial calculations, but it is conceivable that actors who are on the periphery of the scheme may be given pause.").

²³³ See Murphy, *supra* note 63, at 44 (noting that civil plaintiffs have greater discovery tools and a lower burden of proof).

²³⁴ Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231.

²³⁵ See Wedgwood, *supra* note 168, at 178–79.

²³⁶ See *id.*

²³⁷ See Michael D. Goldhaber, *Two D.C. Lawyers' Own War on Terror*, LEGAL TIMES, Apr. 3, 2006, at 24 (quoting a leading proponent of civil antiterrorism

litigation, victims of terrorism may be motivated partially by nonmonetary goals such as the need to have their day in court.²³⁸ Thus, some increased difficulty in enforcing judgments compared to typical private litigation may be offset by factors making terrorism plaintiffs less deterred by problems with the enforcement of judgments.

B. Security, Legality, and Practicality: Guiding Principles

The most effective reform to the current system of civil litigation regarding terrorism actually may be a reduction in its scope.²³⁹ Currently, there is little effective filtering between litigation that furthers U.S. security interests and litigation that does not. Congress should put a limit on the extraterritorial application of civil antiterrorism laws in a way that will accomplish three things: First, the limit must differentiate between terrorist acts that pose a threat to national security and those that do not; second, it must allow for a viable argument to the international community that it does not violate international law; and lastly, it must be defined clearly enough to overcome domestic courts' reluctance to "make law" in the area of national security and diplomatic relations.

Each of these guiding principles justifies changing the scope of antiterrorism laws. First, suits against terrorist are most effective as national security tools if their reach is limited to states and actors posing a threat to the country, not as a means of deterring a type of warfare. Second, as discussed above, the current framework for extraterritorial application of laws does not account for unconventional security threats. Third, plaintiffs have been largely unsuccessful in bringing suit for international acts of terrorism with the exception of when the opposing party

litigation as saying "[w]e have a much more modest goal, and that's to deter respectable financial institutions from being fellow travelers of the jihad").

²³⁸ For example, Professor Carl Tobias told the *New York Times* that the September 11 litigation was likely less affected by issues of recovery:

I think the dynamics here may be different from what I would call more garden variety kind of tort litigation It doesn't seem this is entirely driven by money, though it may be for some people. People want to tell their stories and want to find out as much as they can in court.

Anemona Hartocollis, *Settlements Do Not Deter 9/11 Plaintiffs Seeking Trials*, N.Y. TIMES, Sept. 19, 2007, at B1.

²³⁹ Others have expressed concern over any cutback in antiterrorism civil litigation. See Moore, *supra* note 67, at 5 (expressing concern by calling proceeding too broadly "nonsense on stilts").

fails to appear.²⁴⁰ A more directed authorizing statute will negate the need for courts to be concerned with the interests of the United States in allowing the suit. The easier it is to apply the limitation, the more likely the court will allow suits and the more successful suits may be in bringing to light terrorist activity and financing.

1. Security: Eliminating Counterproductive Lawsuits While Keeping Productive Lawsuits

Currently, suits against terrorists can aid but can also hinder U.S. attempts to combat terrorism and provide security to its nationals. For example, two of the earliest successes under the ATA were for attacks by Hamas agents on persons whom they thought were Israeli nationals. One victim was an American student studying at a yeshiva in Israel,²⁴¹ and the other victims were a U.S. citizen and his wife who were domiciled in Israel.²⁴² The success of those plaintiffs has spawned other suits arising from the deaths of Americans residing in Israel.²⁴³ Certainly, the deaths were tragic and compensation was well justified. However, it is not clear that *U.S. law* should provide the rule of decision or that U.S. interests are served by the verdicts in those cases. In these instances, Israeli or Palestinian authorities can and do pursue criminal charges,²⁴⁴ and Israeli law allows for compensation.²⁴⁵ The U.S. deeming a Palestinian at

²⁴⁰ See Wedgwood, *supra* note 168, at 175 n.35.

²⁴¹ *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1002 (7th Cir. 2002).

²⁴² *Estates of Ungar ex rel. Strachman v. Palestinian Auth.*, 153 F. Supp. 2d 76, 82–83, 98 (D.R.I. 2001).

²⁴³ See *Knox v. Palestine Liberation Org.*, 306 F. Supp. 2d 424 (S.D.N.Y. 2004) (evaluating claim that American killed while singing at a Bat Mitzvah in Israel by alleged PLO agents could recover under the ATA); *Biton v. Palestinian Interim Self-Gov't Auth.*, 310 F. Supp. 2d 172 (D.D.C. 2004) (allowing suit to proceed against the PLO and Palestinian Authority where an American residing in Israel was killed during the bombing of a school bus).

²⁴⁴ *Boim*, 291 F.3d at 1002 (mentioning that one defendant participated in a suicide bombing while awaiting trial by the Palestinian Authority Court for Boim's murder, but the other defendant was convicted and sentenced to ten years in jail); *Ungar*, 153 F. Supp. 2d at 83 (noting that several defendants were convicted by an Israeli court).

²⁴⁵ In *Ungar*, the court found that the state law claims were not valid but that choice of law allowed for Israeli law claims in addition to the ATA—if the plaintiff had chosen to plead them. *Ungar*, 153 F. Supp. 2d at 99. After amending the complaint, three Israeli law claims were added, which became part of the later default judgment. *Ungar v. Palestine Liberation Org.*, 402 F.3d 274, 277, 294 (1st Cir. 2005).

“fault” for an “act of terror” can complicate U.S. foreign policy and harm its security strategy with regard to the Middle East. This failure to squarely address what U.S. interests are involved may also be the source of courts’ reluctance to act in the sensitive area of counterterrorism policy.

The current framework for civil actions arising from acts of terrorism developed in a much different security situation than America now faces. It developed where terrorism appeared to be a threat to Americans travelling abroad²⁴⁶ or a tool of communist groups in third world countries,²⁴⁷ but did not yet appear to be a central problem of national security.²⁴⁸ In passing the ATA and other antiterrorism civil provisions, Congress meant to provide compensation to victims and a tool in the struggle against terrorism, without realizing that in some cases the two goals may conflict. Determining issues of compensation for terrorist acts of foreign nationals in a foreign state where an American was an unintended casualty can weaken and not strengthen U.S. security interests. It requires U.S. courts to pass normative judgments of fault in sensitive areas of foreign relations. If the goal is compensation, the U.S. may provide such compensation more effectively through its own coffers and the seized assets of terrorist organizations, without resort to civil trials.

However, civil litigation against terrorism can be used as an effective tool in maximizing the security of the United States. To do so, the availability of a cause of action must be limited to incidents where further investigation supports U.S. policy interests. Terrorism constitutes a tactic that can be used by both our enemies and allies alike (in addition to those who are simply

²⁴⁶ See 1990 ATA Hearing, *supra* note 57, at 1 (statement of Sen. Grassley) (“A terrorist, for reasons nobody understands, for reasons beyond the concept of humanity, blows a plane out of the air or hijacks a ship or shoots a father, murders a wife, husband, sister or brother.”).

²⁴⁷ *Prosecution Authorization Hearings*, *supra* note 24, at 2 (statement of Sen. Denton) (“There is, for example, a clear pattern of Soviet-supported and Soviet-equipped insurgencies . . .”).

²⁴⁸ See George W. Bush, *Introduction to NATIONAL SECURITY COUNCIL, THE NAT'L SEC. STRATEGY OF THE UNITED STATES OF AMERICA* (2002), available at <http://www.state.gov/documents/organization/15538.pdf>.

Enemies in the past needed great armies and great industrial capabilities to endanger America. Now, shadowy networks of individuals can bring great chaos and suffering to our shores for less than it costs to purchase a single tank. Terrorists are organized to penetrate open societies and to turn the power of modern technologies against us.

Id.

ambivalent to our interests).²⁴⁹ The broad statutes authorizing suit based on the principle of passive personality maximizes recovery for U.S. nationals but fails to make a meaningful distinction between acts of terrorism that threaten U.S. interests and those that do not.

As the rhetoric of the War on Terror moves beyond naming the tactic of terrorism as our “enemy”²⁵⁰ towards a political realist assessment of what threats we face and what allies we have,²⁵¹ Congress should reexamine the purpose of authorizing suits against perpetrators of terrorist acts. Congress should develop a limitation on extraterritorial application of civil antiterrorism statutes that truly invoke a reasonable basis of jurisdiction. Such a change will allow the United States to attempt to establish international law recognizing the ability of the United States to regulate extraterritorially in its own defense. This may be more successful than trying to establish a *jus cogens* norm prohibiting international terrorism.

Despite the hopes of those who passed extraterritorial criminal antiterrorism laws and the ATA,²⁵² terrorism has not become an international crime or tort abhorred worldwide. Instead, “terrorism” continues to elude definition under international law.²⁵³ One day, these limits on customary international law may disappear and international antiterrorism and human rights regulation may gain respect. In the interim, if

²⁴⁹ *Prosecution Authorization Hearings*, *supra* note 24, at 2 (1985) (statement of Sen. Denton) (calling terrorism “the most widely practiced form of modern warfare”).

²⁵⁰ See NATIONAL SECURITY COUNCIL, *supra* note 248, at 5 (“The enemy is not a single political regime or person or religion or ideology. The enemy is terrorism . . .”).

²⁵¹ For example, the National Security Strategy of 2006 rephrases the struggle against terrorism from stamping out terrorism to protecting ourselves and our allies from terrorist attacks. Compare NATIONAL SECURITY COUNCIL, *supra* note 248, at 1 (listing goals as to “[s]trengthen alliances to defeat global terrorism and work to prevent attacks against us and our friends”), with NATIONAL SECURITY COUNCIL, *supra* note 248, at 6 (“As we consider which approaches to take, we will be guided by what will most effectively advance freedom’s cause while we balance other interests that are also vital to the security and well-being of the American people.”).

²⁵² See *Prosecution Authorization Hearings*, *supra* note 24, at 40 (statement of Sen. Specter) (noting that universal remedies under international law “will take a longer period of time, and my sense is that we ought to move in a direct line to define crimes which are violations of the laws of the United States”).

²⁵³ C.L. Lim, *The Question of a Generic Definition of Terrorism Under General International Law*, in GLOBAL ANTI-TERRORISM LAW AND POLICY 37–51 (Victor V. Ramraj, et al. eds., 2005) (depicting the failure of treaty-based and customary international law to develop a generic definition of terrorism).

the period is indeed an interim one, the ATA and other statutes should be redesigned to recognize the reality that not all terrorist acts that injure U.S. nationals concern the security of the U.S.

2. Legality: Building a Foundation for the Legal Response to Unconventional National Security Threats

Although the categories listed by the American Society for International Law fail to adequately guide the proper legal response to nonconventional threats such as terrorism, the principles contained in the categories can help justify a new basis of prescriptive jurisdiction. Currently, the three most expansive bases of jurisdiction provide insight into the rationale for why a country may want to apply its antiterrorism law extraterritorially, but the categories fail to capture the motivation behind antiterrorism law. Universal jurisdiction recognizes that certain conduct may be so abhorrent as to justify a different basis of jurisdiction. Protective jurisdiction recognizes that states have the opportunity to use its law, and not just force, to ensure the survival of the state when others intend to disrupt government functions. Passive personality recognizes that the country wishing to apply its law has an interest in the protection of its citizens abroad.

However, each doctrine has a corresponding weakness. Universal jurisdiction requires a global consensus that will be difficult to achieve, and thus conduct that is not universally abhorrent nor easily definable will fail to become a global norm. Protective jurisdiction requires intent to disrupt an important governmental function, which fails to account for the ability of terrorists to damage a state's interest by targeting only civilian activity.²⁵⁴ Passive personality remedies this defect of protective jurisdiction but reaches too broadly by including all injuries to a country's nationals. These limitations are why the U.S. has been

²⁵⁴ The purpose of using terrorist tactics, as exemplified by al-Qaeda, is that it "spreads psychological terror that is disproportionate to the death and destruction its actions unleash." Peter J. Katzenstein, *Same War: Different Views: Germany, Japan, and Counterterrorism*, 57 INT'L ORG. 731, 734 (2003). For example, studies have found that terrorist attacks directed at U.S. investments in more developed countries cost one million dollars per incident. See Walter Enders et al., *The Impact of Transnational Terrorism on U.S. Foreign Direct Investment*, 59 POL. RES. Q. 517, 531 (2006). The study did not find a statistically significant effect on terrorist attacks in less developed countries, which may be explained by the relatively small number of attacks. See *id.* at 517, 531.

put in the awkward position of proclaiming the existence of passive personality jurisdiction with respect to terrorism and disclaiming it elsewhere.

Given the importance of cooperation in the struggle against anti-American terrorist groups, the U.S. will have to make an attempt to engage the rest of the world regarding the proper legal response to nonconventional terrorist threats. One of the most effective ways to convince other countries to aid in discovery and recognize U.S. judgments will be to justify the extraterritorial application of U.S. antiterrorism laws to the international legal community. This requires developing a jurisdictional basis between universality and the protective principle that reflects a country's interest in applying its laws to unconventional national security threats abroad. Passive personality currently sweeps too broadly, and the international community remains skeptical of its use.

3. Practicality: Convincing Judges To Hear the Type of International Terrorism Cases That Enhance U.S. National Security

Judges tread carefully in areas that affect U.S. foreign policy and national security. While this prudence may be called for generally, in the antiterrorism area, judges' caution prevents the implementation of a potential counterterrorism tool. The most recent and most important embodiment of the federal judiciary's resistance to hearing civil cases that involve questions of foreign policy and national security arose from the *September 11* litigation. In upholding the dismissal of claims against various princes, charities, and instrumentalities of Saudi Arabia on sovereign immunity grounds, Chief Judge Jacobs, writing for the Second Circuit, illustrated an express hostility towards civil litigation in this area:

The remainder [of the September 11 plaintiffs' arguments] overlook what is at stake here: civil liability. That a foreign sovereign is immune to civil claims brought by the victims of its alleged wrongdoing does not mean it has unfettered discretion to commit atrocities against United States nationals. Deterrence (or punishment) does not begin and end with civil litigation brought by individual plaintiffs. Our government has other means at its disposal—sanctions, trade embargos, diplomacy, military action—to achieve its foreign policy goals and to deter (or punish) foreign sovereigns. Although the FSIA

did open an avenue of redress for certain individual victims of state-sponsored terrorism, it did not delegate to the victims, their counsel and the courts the responsibility of the executive branch to make America's foreign policy response to acts of terrorism committed by a foreign state, including whether federal courts may entertain a victim's claim for damages.²⁵⁵

Chief Judge Jacobs is not been alone in his hostility towards litigation in the area.²⁵⁶ The most successful suits are often those against countries and terrorists from countries that have little to no relationship with the United States—such as Iran.²⁵⁷

However, the embarrassment other countries may be faced with if exposed as complicit by private litigation will deter them from aiding terrorist acts.²⁵⁸ Terrorist activity will lessen as few countries will be willing to risk being safe havens for anti-American terrorist groups. Countries that proclaim to the international community to be allies in the struggle against terrorism while sending a different message to terrorist groups will risk being exposed publically. Civil litigation can provide the government and the public with better information than we currently have on private and state-sponsored terrorist groups posing a threat to the U.S. The problem with the view that foreign policy and counterterrorism remains solely the responsibility of the executive branch is that it fails to recognize the history of the ATA and other antiterrorism statutes in supplementing executive branch efforts. The advantage of allowing suit in the U.S. for terrorist acts abroad is that it creates an incentive to investigate terrorist acts when the executive has failed to investigate or has done so incompletely.²⁵⁹

²⁵⁵ *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71, 90 (2d Cir. 2008), cert. denied, 129 S. Ct. 2859 (2009).

²⁵⁶ See Wedgwood, *supra* note 168, at 159.

²⁵⁷ For example, Iran, Libya, and Syria occur repeatedly in the list of successful judgments against state sponsors of terror. See *id.* at 175 n.35.

²⁵⁸ See Philip B. Heymann, *Dealing with Terrorism: An Overview*, INT'L SEC., Winter 2001-02, at 24, 25 (positing that one reason a terrorist attack did not occur before September 11 was that harboring states conditioned their aid on groups not angering the U.S.).

²⁵⁹ For example, many have been critical about the U.S. intelligence community's priorities and efforts in counterterrorism prior to the September 11 attacks. See Posen, *supra* note 225, at 47 ("Nevertheless, this intelligence effort has been the subject of persistent criticism, in particular for weaknesses in interagency cooperation; failure to concentrate all potentially useful information in one place, especially information gathered by law enforcement agencies in the United States; and untimely analysis.").

C. *Using Intent-Based Jurisdiction for Civil Litigation Against Terrorism To Better Reflect Principles of Security, Legality, and Practicality*

In passing the criminal antiterrorism laws, the ATA, and newer laws—like the RICO amendments—Congress has so far failed to consider whether trying to fit its actions into the five categories listed by the American Society for International Law in 1935 was the wisest approach. Congress's objectives would be better served if, instead of trying to shape the five traditional categories into providing incredibly broad jurisdiction only for terrorism, it formulated a basis of prescriptive jurisdiction that fits the needs of countries in an interconnected global community with international, unconventional global threats.²⁶⁰ This new basis of jurisdiction would fall between protective jurisdiction and passive personality in terms of breadth, but it would better reflect the country's interest in applying its laws to unconventional security threats.

The solution to the problem of finding the right basis for the extraterritorial basis arises from recognizing that the peculiar nature of terrorism requires a new jurisdictional basis. The mistake in relying on passive personality while adding a terrorism-only proviso is that the proviso and not the nationality of the victim is the reason the U.S. wishes to legislate extraterritorially. There should be a sixth basis—national security jurisdiction—which allows a state to proscribe conduct that is intended to harm nationals of the state in order to destabilize the state. This Section formulates a precise statement of the interests that justify a state applying its laws to unconventional security threats abroad: protection from groups that wish to destabilize a nation by limiting its nationals' activity abroad. It does so in a way that addresses the three concerns, stated above: (1) tailoring the substantive law to national security interests (security); (2) providing an acceptable basis to form international law (legality); and (3) sufficient clarity to overcome domestic hostility to civil litigation involving foreign relations (practicality). The U.S. has a choice between two approaches: (1) continuing to define the jurisdictional basis in

²⁶⁰ The attacks of September 11 and prosecuting terrorist attacks generally have highlighted the shortcomings of international law in other similar ways. See Christopher Greenwood, *International Law and the 'War Against Terrorism,'* 78 INT'L AFF. 301, 302–05 (2002).

terms of terrorism, but limiting the scope of the basis; or (2) using a basis not limited to terrorism that would allow the U.S. to apply antiterrorism statutes extraterritorially but that also allows other countries to apply extraterritorially laws that target what they perceive as conduct posing a security threat.

1. The ATA Inspired Approach: Terrorism-Based National Security Jurisdiction

An incremental way to implement some of the proposed reforms would be to adopt the definition of terrorism in the ATA as the jurisdictional basis, with modification to ensure that its scope is limited to cases where there is a U.S. security interest. This would largely be the approach the U.S. has taken—albeit, more openly by naming antiterrorism as the express basis for U.S. action and not justifying it in language of principles of “protective jurisdiction” or passive personality. This approach would largely retain current law with a slight amendment to reflect U.S. interests. Thus, the U.S. could simply argue that international law should allow extraterritorial application when the acts are intended to intimidate or coerce the civilian population of the United States, or another civilian population, to influence the policy of the United States by intimidation or coercion, or to affect the conduct of the United States.²⁶¹ The difference from the ATA lies in that the coercion must be directed at the U.S. civilian population or the United States government rather than simply at any civilian population or foreign government.

This approach does represent a step towards better tailoring antiterrorism laws to U.S. national interests because the terrorists must be either targeting the U.S. civilian population or intending to alter U.S. policies or interests. Thus, cases where a U.S. national is an innocent bystander are eliminated. This approach would be more upfront than the current approach of claiming that the U.S. is acting based on passive personality but opposing the same in every other context. However, such honesty in expressly invoking a terrorism-specific jurisdiction would likely not overcome the difficulties that prevent the world community from agreeing on a generic definition of terrorism.

²⁶¹ This is essentially the approach the Restatement (Third) takes. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 cmt. g (1987); see also McCarthy, *supra* note 105, at 318–21 (advocating for a similar result).

Many countries may oppose a terrorism-focused jurisdictional basis because what other countries may view as legitimate conduct or, at the least, not wholly illegitimate conduct, the U.S. views as terrorism. For example, if a group of terrorists concerned about the strong ties of the United States to one side in a regional or domestic conflict targets U.S. nationals or kills civilians wishing to change U.S. policy, the countries who sympathize with those on the opposite side as the U.S. may not view such conduct as terrorism but as a reaction to U.S. "meddling." They may think that the application of U.S. law would further complicate the matter or represents an imperialist action. A jurisdictional basis less focused on terrorism may be more successful.

2. Intent-Based National Security Jurisdiction: A Balanced Approach

Another more effective jurisdictional basis may simply be to require that, instead of merely injuring a U.S. national, the terrorist act be intended to physically harm U.S. nationals because they are U.S. nationals. This would satisfy the first of the three guiding principles that the limitation must better tie liability to the presence of a U.S. interest. If the attack is directed at a person because they are a U.S. national, it is much more likely that the attack poses a threat to U.S. security interests than simply if U.S. nationals were inadvertently killed. In addition, because the focus is intent, it will not matter if a U.S. national was actually killed or injured in the attack. Similar to the protective principle, the potential danger justifies the exercise of jurisdiction, not the results of the attack.

Table 1: Comparison of Existing and Proposed Bases of Prescriptive Jurisdiction

Jurisdictional Basis	Scope of Prescriptive Jurisdiction	Rationale for Extraterritorial Application of Law	Limitations of the Basis in Combating Unconventional Security Threats
Subjective Territoriality	Can regulate conduct at issue if some material conduct occurred within the territory	Sovereignty over territory within the borders of the state	Most terrorist attacks do not involve conduct within the U.S.
Objective Territoriality	Direct and material effects within the territory that were intended to occur and did occur	Interconnected world allows for interference within territory from outside borders	Effects within territory from terrorist attacks abroad are too attenuated and insubstantial to support exercise of jurisdiction
Nationality	Can regulate nationals of a country residing abroad	Country of nationality assures protection of its nationals and can limit their conduct	Few terrorists are nationals of the country they threaten

Jurisdictional Basis	Scope of Prescriptive Jurisdiction	Rationale for Extraterritorial Application of Law	Limitations of the Basis in Combating Unconventional Security Threats
Protective Jurisdiction	Can regulate those who intend to disrupt important governmental functions	Threat to survival of state justifies action before effect occurs	Unconventional security threats are often intended to harm only civilian targets
Passive Personality	Any attack that injures a national of the country	Desire to protect its nationals abroad	Intrusion on other country's sovereign not in proportion to interests of the state, problems of notice
Universality	Any conduct which violates a <i>jus cogens</i> norm	Certain conduct is so abhorrent that any country can punish it	Only certain terrorist attacks would violate an established <i>jus cogens</i> norm
Restatement (Third) Approach	Any <i>terrorist</i> attack that is intended to injure a national of that country because of their nationality	Combination of abhorrence of terrorism, survival of government, and protection of nationals abroad	The lack of an accepted definition of terrorism will limit acceptance abroad

Jurisdictional Basis	Scope of Prescriptive Jurisdiction	Rationale for Extraterritorial Application of Law	Limitations of the Basis in Combating Unconventional Security Threats
Intent-Based National Security Jurisdiction	Any attack intended to physically harm a national because of their nationality	Recognition that certain attacks on civilian targets weakens a country's national security	A new basis will take diplomatic efforts to gain acceptance

Implementing an intent-based prescriptive jurisdiction can be accomplished if Congress amends the ATA's and RICO's antiterrorism predicates to include only acts that were intended to physically harm U.S. nationals. The ATCA would then still be left for the development of antiterrorist norms under customary international law and general jurisdiction if Congress and the executive wish to continue to pursue further universalist actions.

a. Finding Enemies: Security Benefits of the Intent-Based Approach

An intent-based approach will facilitate the main benefit of civil litigation against terrorism: information gathering. Private attorneys general will be motivated by the potential for civil recovery to research and attempt to discover whether acts of terror were targeted at Americans. These suits could reveal anti-American terrorist organizations, which may only have the operational capacity to target small groups or a single American abroad, but which could grow into greater regional or international terrorist powers. The U.S. intelligence services may not have the resources or motivation to track such small-scale organizations; thus, civil litigation can serve as a great compliment to the national security apparatus.

The downside would be that some terrorist activity may not target U.S. nationals but does affect U.S. security interests. For example, this could occur if a group only targets non-U.S.

nationals who collaborate with the U.S. government or associate with U.S. nationals. However, any loss in national security in not allowing suits against such organizations would be offset by serving the other two goals of establishing international law and creating a law that could be effective in practice. Limiting suits in U.S. courts to attacks directed at U.S. nationals recognizes that the foreign state and not the U.S. has the interest in and responsibility of addressing attacks intended to kill its own citizens, even if related to U.S. interests. Second, determining the strength of U.S. interests in attacks of foreigners without an easily applied proxy could lead judges to view terrorism lawsuits negatively because each decision would require judges to balance important foreign policy and national security interests.

There is great potential for a system organized around filtering attacks based on whether the intended targets were U.S. nationals. For example, suppose an anti-American small-scale terrorist organization sets off a bomb in a heavily populated tourist destination in the hope of killing Americans. The bomb only kills locals or non-U.S. foreigners. Under the current ATA and passive personality regime, because the inept or unlucky terrorist failed to kill a U.S. national, the U.S. would not claim jurisdiction.

Imagine a second case, where members of a minority ethnic group feel persecuted and in retaliation, set an explosive off in their own government's building. They intend only to harm employees of this foreign government but, coincidentally, a U.S. tourist walks by and is killed. Under the current civil antiterrorism statutes, the U.S. would claim proscriptive jurisdiction over an attack by terrorists that was intended to injure only non-Americans, but happened to kill a U.S. national.

In the first case, allowing either non-U.S. nationals who were injured or U.S. nationals, present but not injured, to sue would bring to light a terrorist threat to the U.S. that had gone unnoticed. In the second case, the fact that a U.S. national died, while tragic, does not necessarily enhance U.S. security by allowing the victim to sue in U.S. courts.

b. *Winning Friends: Using the Intent-Based Approach To Create International Law for Unconventional Security Threats*

Such an approach would have stronger support internationally than a terrorism-only jurisdictional basis (which is effectively the U.S.'s current approach). While being the target of terrorism may only be a national security concern for a handful of countries, more countries may be open to a basis that allows the application of their laws to conduct, targeted at their nationals, that they deem to be a national security threat. Using the intent of an actor already has a small but limited recognition in current sources. The comments to the Restatement (Third) of Foreign Relations—which, contrary to the Restatement (Second),²⁶² recognize a limited use of the passive personality principle for terrorist acts—tries to further limit its application to “organized attacks on a state’s nationals by reason of their nationality.”²⁶³ By eliminating the use of passive personality and terrorist-centric focus, the intent-based national security jurisdictional basis will make a statement to the world that the U.S. will now only narrowly apply its laws when it views that its security is being threatened through attacks intended toward its nationals. At the same time, the jurisdictional basis is no longer “terrorism” specific, allowing other countries to apply their laws to conduct directed against their nationals.

Attempts to form a consensus on the acceptability of intent-based national security jurisdiction will have immediate benefits. First, enforcement of U.S. judgments abroad often presents problems. Several foreign countries have refused to enforce U.S. judgments because of the “nature of U.S. jurisdictional claims,” among other factors.²⁶⁴ In addition, several states have reciprocity requirements for the recognition and enforcement of other country’s judgments—requiring that the state wishing to have its judgment enforced must enforce the foreign country’s judgments of the same type.²⁶⁵

²⁶² The Restatement (Second) of Foreign Relations expressly disclaimed the existence of passive personality jurisdiction. See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 30(2) (1965) (“A state does not have jurisdiction to prescribe a rule of law attaching legal consequences to conduct of an alien outside its territory merely on the ground that the conduct affects one of its nationals.”).

²⁶³ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 cmt. g (1987).

²⁶⁴ BORN & RUTLEDGE, *supra* note 87, at 1016–17.

²⁶⁵ *Id.* at 1026–27, 1031–32.

In both cases, the current use of passive personality impedes enforcement. Intent-based national security jurisdiction will help to solve both of these problems. In comparison, passive personality is a controversial and almost limitless jurisdictional basis. Because of this, the U.S. continues to protest other countries' uses of the basis.²⁶⁶

An intent-based jurisdiction has several benefits. Intent-based jurisdiction is reasonably limited to attacks intended to harm a country's nationals. This represents a firmer basis to exercise jurisdiction than pure nationality of the victim. It also eases concerns about fairness because the defendant has to target a particular country and its nationals. Thus, foreign countries will be more likely to accept the basis and less likely to protest that the U.S. is using an extravagant basis of jurisdiction.

The proposed jurisdictional basis will be recognized by the U.S. for all substantive areas where it could apply (physical attacks based on nationality). This easing of the terrorism-only recognition found in the current use of passive personality will allow other countries to use and recognize the basis. Currently, states that are not the subject of frequent terror attacks have no incentive to recognize passive personality jurisdiction—but only in terrorist attacks. States may, however, be interested in protecting their nationals from acts of genocide, coercion, or racial violence that occur because of their citizens' nationalities. When these countries look to see if reciprocity exists between themselves and the United States, an intent-based jurisdiction could be recognized by both countries, where the other country may have found no reciprocity for a passive personality basis due to U.S. objections for its use.

The U.S. will be able to retain the parts of its antiterrorism laws relevant to its national security, while gaining allies and broader acceptance of its judgments, by removing the less effective parts of its civil antiterrorism laws.

c. *Convincing Judges: A Clear Proxy for U.S. Interests*

If U.S. antiterrorism laws are redesigned to reflect an intent-based national security jurisdiction, it would send a clear message to judges and the public that civil suits are an important

²⁶⁶ See Watson, *supra* note 44, at 11–12.

part of the U.S. security strategy and that important interests are served in allowing such suits. This will satisfy the last principle of practicality.

Despite some challenges in proving intent to attack a U.S. national, a jurisdictional basis focused on this intent will reduce courts' unwillingness to entertain antiterrorism suits. The reason for this would be that the doctrines commonly used to eliminate suits with a U.S. interest would be inapplicable or subsumed into an ATA written to reflect the intent principle. First, personal jurisdiction would likely no longer be an issue in suits against nonstate terrorist actors because the new ATA would reflect the currently recognized exercise of jurisdiction over acts intended to have an effect in the jurisdiction.²⁶⁷ Given this argument, the imprimatur of Congress provided by its passing of a new statute will encourage courts to look more favorably on finding personal jurisdiction. Ensuring a stronger U.S. interest may even motivate courts to eliminate their current distinction between personal jurisdiction over state sponsors of terror and private actors. In both cases, the definition of terrorism under U.S. law will ensure that the defendants could expect to end up in U.S. courts for each situation that U.S. substantive law applied because the terrorists would have to target U.S. nationals for being U.S. nationals.

Similarly, the doctrine of *forum non conveniens* can be abrogated for foreign plaintiffs who were injured in attacks directed at U.S. nationals. A strong U.S. interest exists in this situation: furthering counterterrorism policy. Foreign victims may, in some instances, be the only victims of an attack, even if the attack was aimed at U.S. nationals. The allowance of suits by foreign nationals would not open the floodgates because they would still have to show that the attack was directed at U.S. nationals, which ensures a U.S. interest in litigation held in U.S. courts. *Forum non conveniens* would be less appropriate in this situation because the U.S. wants to ensure that these plaintiffs get all the advantages a U.S. forum provides them, particularly that of broad discovery.

Lastly, the FSIA could be amended to allow for antiterrorism suits against more than the four countries designated state sponsors of terror, so long as the attack involved was directed at

²⁶⁷ See *supra* note 194.

U.S. nationals. This would result in a limited expansion of foreign countries' current amenability to suit. The increased potential liability would be offset by the gain in having better information on the contacts of foreign states to anti-American terrorist groups. It would tangibly raise the public relations cost of supporting anti-American terrorism and would also deter countries with economic or foreign relations ties from engaging in such conduct.

The drawback to the intent-based approach would be that proving purpose or intent could be difficult, certainly more difficult than showing nationality. However, the more anti-American the attack or organization, the easier this may be to show. For example, an attack on a housing complex where U.S. service members are stationed,²⁶⁸ an attack on the offices of an American corporation, or an attack on a hotel frequently used by Americans strongly supports an inference that the attack was directed at U.S. nationals. Discovery into the motivation and ideology of the alleged terrorists could also provide evidence supporting an inference of intent. This could lead to information on things such as whether they possessed or distributed anti-American propaganda. Thus, the main issue in every terrorist lawsuit would also be the most important in terms of American interests: Do these actors threaten the security of U.S. interests and nationals either domestically or abroad?

CONCLUSION

The idea that the American legal system can eliminate terrorism as a tactic remains a quixotic goal. Civil antiterrorism laws should be reformed to aid a more practical goal: securing the United States. This Article demonstrated that the bases for prescriptive jurisdiction currently recognized under international law do not allow a country to adequately respond to unconventional national security threats. To fix the problem requires developing a prescriptive jurisdictional basis that reflects the interests of the U.S. and other countries in applying their own laws to unconventional national security threats, particularly terrorism. This Article introduced such a principle—

²⁶⁸ See, e.g., *Estate of Heiser v. Islamic Republic of Iran*, 466 F. Supp. 2d 229, 264–65 (D.D.C. 2006) (finding Iran liable for attacks on Khobar Towers in Saudi Arabia).

“intent based national security jurisdiction”—which will allow the U.S. to reform the civil antiterrorism laws to align the benefits of civil litigation with the country’s national security needs. This Article then showed that such a jurisdictional basis furthers the goals of security, legality, and practicality. With such reforms, the civil justice system supplements the U.S. antiterrorism efforts in criminal prosecutions and intelligence gathering, furthering U.S. security interests.

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